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No. 86-1485

Supreme Court, U.S.
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In The

# Supreme Court of the United States

CORRECTED COPY

October Term, 1986

TOWNSHIP OF EDISON, NEW JERSEY,

*Petitioner,*

*vs.*

MARCOS SKEVOFILAX, LOUISE SKEVOFILAX, MICHAEL MICHAELS, SERGEANT WILLIAM QUIGLEY, PATROLMAN CHARLES L. FEKETE and PATROLMAN DOMINICK SEMENZA,

*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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## QUESTIONS PRESENTED FOR REVIEW

1. Did the district court have jurisdiction under the Federal Rules of Civil Procedure to order the petitioner to pay judgments entered against individual police officers?

2. Assuming that the district court had jurisdiction, did the district court err in holding that the Township must pay the judgment entered against the individual police officers?

## PARTIES TO THE PROCEEDING BELOW

Appellant in the proceeding below was petitioner, Township of Edison. Appellees in the proceeding below were respondents Marcos Skevofilax, Louise Skevofilax, and Michael Michaels. Police Officers Quigley, Fekete and Semenza were also parties to the proceeding below.

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**APPENDIX**

No.

In The

# Supreme Court of the United States

October Term, 1986

TOWNSHIP OF EDISON, NEW JERSEY,

*Petitioner,*

*vs.*

MARCOS SKEVOFILAX, LOUISE SKEVOFILAX, MICHAEL MICHAELS, SERGEANT WILLIAM QUIGLEY, PATROLMAN CHARLES L. FEKETE and PATROLMAN DOMINICK SEMENZA,

*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

### OPINIONS BELOW

The *en banc* opinion of the United States Court of Appeals for the Third Circuit, No. 85-5300, January 22, 1987, is included as Appendix A (1a). The panel opinion of the United States Court of Appeals for the Third Circuit, No. 85-5300, May 7, 1986, is

included as Appendix B (45a). The United States District Court for the District of New Jersey did not issue a written opinion; however, a transcript of the hearing of April 25, 1985 is included as Appendix C (77a) in its entirety.

## STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on January 22, 1987. The Supreme Court of the United States has jurisdiction to review the judgment of the United States Court of Appeals for the Third Circuit pursuant to 28 U.S.C. § 1254(1). The matter originally was filed in the District Court for the District of New Jersey because the plaintiffs alleged violation of their constitutional rights under 42 U.S.C. § 1983.

## STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Rule 69 of the Federal Rules of Civil Procedure is involved in this case.

## STATEMENT OF THE CASE

Respondents Marcos Skevofilax, Louise Skevofilax, and Michael Michaels alleged that the officers of Edison Township, named as defendants, had violated their constitutional rights during an incident which began as a barroom fight which occurred October 25, 1977 in an Edison restaurant. As a result, the plaintiffs sought relief under 42 U.S.C. § 1983. Respondents also pleaded pendent state law claims against the Township for negligence and against the officers for malicious prosecution.

A seven-week trial in the District Court for the District of

New Jersey ensued which resulted in a judgment in favor of respondent Skevofilax against petitioner Edison Township for $74,964.14 for its negligence and against the police officers, Quigley, Fekete and Semenza, individually for $296,700.19 for their § 1983 claims and $55,236.75 for malicious prosecution. Respondent Michaels obtained a judgment against the police officers individually for $11,000 for their violation of his constitutional rights and $1,000 for malicious prosecution. The district court, acting pursuant to 42 U.S.C. § 1988, also awarded a judgment for attorneys' fees against the police officers individually in the sum of $199,521. No punitive damages were awarded.

**A. Course of Proceedings**

The issues presented in this petition came before the district court by way of an order to show cause on April 25, 1985. The application by plaintiffs' counsel was made under the guise of Rules 69 and 70 of the Federal Rules of Civil Procedure. Plaintiffs contended in their order to show cause that the Township under its PBA contract was obligated to pay the judgments against the police officers. The contract provided as follows:

> In the event of a judgment against a member of the bargaining unit arising out of or incidental to the performance of his duty, the employer agrees to pay for said judgment or arrange for the payment of said judgment.

On that same day, the district court entered an order (106a) which required, *inter alia*, that the Township of Edison pay all the judgments with interest rendered against the police officers in favor of the respondents plus the attorneys' fees awarded by the court with interest.

The Township's application for a stay of the order pending appeal was denied by the District Court.

Essentially, the district court ruled, on the return date of the order to show cause, nearly one year after the jury's verdict that the Township of Edison was required to indemnify the police officers for $575,000 in judgments plus interest and costs. The ruling was made notwithstanding the fact that the police officers had not cross-claimed for indemnification and accordingly, those issues were not before the district court when the matter was tried.

A notice of appeal was filed on April 26, 1985. Petitioners sought a stay of the district court's order of April 25, 1985 pending appeal. On April 30, 1985, the Third Circuit Court of Appeals stayed the district court's order pending resolution of the appeal.

On May 7, 1986, Judge Stapleton writing for of panel of the Third Circuit Court of Appeals (59a), reversed the holding of the district court insofar as its order required the Township to pay the judgments against the police officers.

Respondents subsequently filed a petition for rehearing and rehearing *en banc* which was granted by the Third Circuit Court of Appeals.

Upon rehearing by the full court, the Third Circuit affirmed the decision of the district court below and filed a judgment requiring the Township to pay the judgments against the above-named defendants on January 22, 1987 (1a).

On February 9, 1987, petitioner filed a motion for a stay of the issuance of the mandate which was granted on February 24, 1987 by the Third Circuit Court of Appeals.

## REASONS FOR GRANTING THE WRIT

### I.

### THE WRIT SHOULD BE GRANTED BECAUSE THE ISSUES IN THIS CASE PRESENT AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NEVER BEEN DECIDED BY THIS COURT.

Pursuant to Supreme Court Rule 17.1(c), a writ of certiorari may be granted where "a federal court of appeals has decided an important question of federal law which has not been, but should be settled by this Court . . . ." *See, e.g., Charles Dowd Box Co., Inc. v. Courtney*, 368 U.S. 502, 505-506 (1962).

This case poses such a question which requires final determination by this Court to wit: do the federal courts have the power to conduct post-judgment enforcement proceedings in aid of execution of federal judgments where there is no independent basis for jurisdiction?

Petitioner successfully argued this matter before a panel of the Third Circuit Court of Appeals. Circuit Judge Stapleton, writing for the majority stated:

> The plaintiff's motion for a post-judgment order

> directing the Township to indemnify its police officers brought before the district court for the first time a state law claim over which it had no independent basis of jurisdiction. At that point, the district court lacked ancillary jurisdiction to entertain that claim and its order granting the requested relief cannot stand.

*Skevofilax v. Quigley,* No. 85-5300, slip op. at 15 (3d Cir. May 7, 1986) (hereinafter referred to as "Panel Opinion") (59a).

Petitioner respectfully submits that the panel of the United States Court of Appeals for the Third Circuit which originally heard this matter properly held that the district court was without jurisdiction to decide the liability of petitioner to indemnify the defendant police officers in this case. Petitioner further submits that even if the Court may find that the district court had the power to decide the indemnification issue, that the trial judge erred in deciding the issue without a plenary hearing as to the facts which were not the subject of the primary litigation and were not before the court.

**A. The Third Circuit Erroneously Found that Rule 69 Conferred Jurisdiction on the District Court in this Case.**

It is not the petitioner's contention that the federal courts are without ancillary jurisdiction in any case to execute on their judgments. The power for that jurisdiction has been conferred by Federal Rule of Civil Procedure 69.[1] Petitioner argued to the

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1. Rule 69 provides in pertinent part: "proceedings supplementary to and in aid of a judgment . . . shall be in accordance with the practice and procedure of the state in which the District Court is held, existing at the time the remedy is sought, except that any statute of the United States governs to the extent that it is applicable."

Third Circuit, however, that the application of Rule 69 in this case cannot confer ancillary jurisdiction on the district court. As stated by Judge Stapleton in his dissent in the *en banc* opinion, "The 'practice and procedure' in New Jersey, . . . does not authorize what transpired in this case." *Skevofilax v. Quigley,* No. 85-5300, slip op. at 30 (3d Cir. Jan. 22, 1987) (hereinafter referred to as "*En Banc* Opinion") (30a). No practice or procedure of the State of New Jersey has been cited which authorizes a court, after a summary supplementary proceeding, to enter an order directing one party to be responsible for satisfying a judgment entered against another person. Nor is there any federal statute permitting such a procedure.

Judge Becker, who joined the majority of the *en banc* opinion, but chose to write separately, pointed out in his concurring opinion that:

> Judge Gibbons' opinion appears to assume the broad proposition that a federal court has ancillary jurisdiction over any effort to enforce its judgment regardless of whether the adjudication of the defendant's claim for funds involves facts and defendants unrelated to the original dispute.

*En Banc* Opinion at 25 (25a).

As stated by the dissent in the *en banc* opinion, the district court "should be able to point to some specific authority before it asserts the right to resolve a state law claim against a third party who could not be forced to litigate in a federal court but for the fortuity that his creditor has suffered a federal judgment." *En Banc* Opinion at 32-33 (Stapleton, J., dissenting) (32a-33a).

The statutes relied upon by the respondents in the proceedings below were N.J. Stat. Ann. §§ 2A:17-59, 61, 62 and 63. The majority for the panel decision held that none of these was

applicable in this case and stated that the New Jersey statutes cited by respondents "do no more than authorize an executing officer to take advantage of available legal proceedings. They do not purport to create any new legal proceedings or to grant jurisdiction to litigate claims of judgment debtors against third parties." Panel Opinion at 6 (50a). Although an obligation of a third party to the judgment debtor may be garnished, the court may only order the garnishee to pay the judgment creditor "if the garnishee admits the debt."[2]

Judge Stapleton reasoned that although Rule 69 may incorporate the New Jersey statutes and arguably authorizes an officer executing a federal judgment to bring suit in state court of general jurisdiction" *it cannot* be read to authorize a district court to adjudicate any claim that it would not otherwise have authority to decide." Panel Opinion at 7 (emphasis added) (51a).

The panel, we submit properly held that to confer jurisdiction of the district court in this case to decide the controversy which arose as a result of a disputed indemnification clause in the collective bargaining agreement between petitioner and the police

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2. Judge Stapleton cited the following passage from E.J. Jennings, *Practice-Law Division,* 3A *New Jersey Law with Forms* § 14.02 at 14-502 (1982):

> The garnishee must admit the debt or the Court has no jurisdiction to order him to pay it over. *Beninati v. Hinchliffe,* 126 N.J.L. 587, 70 A.2d 64 (E. & A. 1941). If the garnishee denies the debt, the proper practice is for the sheriff or a receiver to sue the garnishee. *N. Drake, Inc. v. Donovan,* 8 Misc. 869, 152 A. 337 (Sup. Ct. 1930)' *Barrett Co. v. United Building & Construction Co.*, 5 Misc. 87, 135 A. 477 (Sup. Ct. 1926); *Sebring v. Patt,* 91 N.J.L. 393, 103 A. 999 (Sup. Ct. 1918). (footnote omitted)

*En Banc* Opinion at 30-32 (Stapleton, J., dissenting) (30a-32a).

officers would expand the jurisdiction of the federal courts in violation of Fed. R. Civ. P. 82 (no Rule of Civil Procedure "shall . . . be construed to extend or limit the jurisdiction of the United States District Courts."). Application of Rule 82 allows only application of state practice and procedures to the extent that they do not expand the jurisdiction of the federal courts. *See Owen Equipment & Electric Company v. Kroger,* 487 U.S. 365, 370 (1978) (held district court lacked power to entertain the claim against the third-party defendant following dismissal of the action as to primary defendant, absent an independent basis for federal jurisdiction over that claim); *see also, Blackburn Truck Lines, Inc. v. Francis,* 723 F.2d 730, 732 (9th Cir. 1984); *Duchek v. Jacobi,* 646 F.2d 415, 417 (4th Cir. 1981) (Rule 69(a) is one of procedure not jurisdiction) (emphasis added).

**B. The Third Circuit Erroneously Applied Rule 13(g) to Allow Jurisdiction by the Federal Court.**

At the district court judge's insistence, the plaintiffs applied for a rule to show cause why petitioner should not be ordered to pay the judgments against the police officers. The district court and the Third Circuit essentially, therefore, allowed the plaintiffs to create ancillary jurisdiction, by the simple act of filing their application in the proceeding, where none would otherwise exist. Plaintiffs voluntarily did not assert their claim against petitioner during the five years of litigation and waited in fact approximately one year after the entry of the final judgment to pursue this present claim.

Petitioner insisted that the district court lacked jurisdiction to adjudicate the police officers' indemnity. The district court, however, purported to act under Rule 69 and ordered that petitioners pay the judgments against the police officers. The majority, in the *en banc* opinion, however, justified the action

of the trial judge on the alternative theory that because a federal court has ancillary jurisdiction over cross-claims under Fed. R. Civ. P. 13 which asserts that a claimant is entitled to be indemnified if he or she is found liable to the plaintiff.

While the statement of the rule is accurate, as the dissent points out, there is no authority which would sanction the exercise of ancillary jurisdiction in this case. It is important to note that three of the judges of the majority declined to join in this aspect of the opinion. Judge Becker stated:

> The mere fact that jurisdiction would have been proper if the claim were made earlier, however, does not make it proper here. In many situations, the balance of convenience, judicial economy and fairness that generally justified ancillary jurisdiction might not justify a claim brought after the initial litigation is over. For example, a fact-specific, disputed claim against a new unrelated third party asserted after the end of the principal litigation will rarely save judicial resources by being attached to the original litigation because the new party is entitled to relitigate any questions of fact relevant to its liability.

*En Banc* Opinion at 27-28 (Becker, J., concurring) (27a-28a); *see also,* discussion in *En Banc* Opinion at 28, n. 1 (28a).

The dissent also points out that the mere assertion of the cross-claim by the plaintiffs would not have automatically entitled them to a federal forum. On the contrary, pursuant to Fed R. Civ. P. 15(a) they would have been required to amend their pleadings, which could only have been done in this case if they moved first to vacate the final judgment. *See, e.g., Kelly v. Delaware River Joint Commission,* 187 F.2d 93, 94-95 (3d Cir.),

*cert. denied,* 342 U.S. 812 (1951). Therefore, the hypothetical post-judgment motion created by the majority could not have been granted without disturbing the final judgments which existed.

## II.

## THE WRIT SHOULD BE GRANTED BECAUSE THE *EN BANC* OPINION OF THE THIRD CIRCUIT IS IN DIRECT CONFLICT WITH THAT OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT IN *BERRY v. McLEMORE.*

Pursuant to Supreme Court Rule 17.1(b), a writ of certiorari may also be granted where a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter. *See, e.g., Federal Trade Commission v. Flotill Products, Inc.,* 389 U.S. 179, 181 (1967).

Recently the United States Court of Appeals for the Fifth Circuit was faced with the question of whether, the mere existence of an unsatisfied federal judgment by itself, bestows ancillary jurisdiction on a district court to adjudicate any claim the judgment debtor may have against the third party. The court in *Berry v. McLemore,* 795 F.2d 452 (5th Cir. 1986), when faced with essentially the same set of facts as were before the Third Circuit in this case, answered the question in the negative. Factually, *Berry* is virtually indistinguishable from the case at hand, yet the Fifth Circuit held that the district court had no jurisdiction over the post-judgment garnishment claims of the plaintiff where no independent grounds for federal jurisdiction existed.

In *Berry,* the plaintiff sued McLemore, the Chief of Police of Maben, Mississippi in a civil rights action for having violated his constitutional rights under 28 U.S.C. § 1983 during the course of an arrest. A judgment was entered against McLemore for

$10,000 plus attorneys' fees and costs. Because McLemore failed to pay the judgment, Berry filed a "suggestion of garnishment" in the district court in order to collect his judgment from the town. Berry alleged that the town had promised to pay any judgment he obtained and he asserted that the district court had ancillary jurisdiction to adjudicate McLemore's claim against the town. *Berry v. McLemore, supra,* 795 F.2d at 453.

The district court held that by applying Mississippi law, Berry could not recover on a writ of garnishment from the town because McLemore had not obtained a judgment against the town for the amount allegedly owed. *Id.* at 454. Since Berry did not obtain such a judgment, the district court directed a verdict for the town. *Id.*

The Fifth Circuit rejected the trial court's findings and stated:

> [F]rom a review of the procedural posture and facts of the garnishment actions, we conclude that *there is no federal jurisdiction* over the action by Berry against the Town . . . and dismiss this action without reaching the merits of Berry's arguments concerning the Mississippi law or garnishments.

(Emphasis added.) *Id.*

The Fifth Circuit based its holding on the fact that the garnishment proceedings are separate and independent actions which had no basis for independent federal jurisdiction. *Id.* at 455, *citing, Butler v. Polk,* 592 F.2d 1293, 1295 (5th Cir. 1979).

The Fifth Circuit reasoned that any obligations of the town arose from the contractual relationship between the town and McLemore which was not the subject of the prior litigation which was based on the constitutional claims against McLemore. The

court found that although the town was actually a party to the constitutional action, it was essentially a third party with respect to Berry's claim for indemnification. The court stated:

> We can find no case where a court held that it had ancillary jurisdiction to consider claims in a *new and independent action* merely because the second action sought to satisfy or give additional meaning to an earlier judgment.

*Id.*

* * *

> [S]ubject matter jurisdiction as defined in 28 U.S.C. § 1331 does not exist because an action for a writ of garnishment arises from state law not federal law. (citing Mississippi statute) There is no diversity because the town and McLemore are all citizens of Mississippi. 28 U.S.C. § 1332.

*Id.* at 456.

Petitioner respectfully submits that the analysis applied by the Fifth Circuit was in fact the same analysis which prompted the original panel of the Third Circuit to hold in favor of petitioner and is the proper analysis which should be adopted by this Court. The proposition that an independent suit to collect a federal judgment requires an independent basis of federal jurisdiction is supported by prior caselaw. *See H.C. Cook Company v. Beecher*, 217 U.S. 497 (1910) (federal district court does not have ancillary jurisdiction to entertain an independent action to collect state law debt simply because that independent action is part of

an action to collect a federal judgment).[3] As stated by Judge Becker in his concurring opinion, Judge Gibbons' discussion of ancillary jurisdiction "cuts too broadly" and the broad analogies he employs in the majority opinion will prove to be "problematic." *En Banc* Opinion at 24-25 (Becker, J., concurring) (24a-25a). Specifically, Judge Becker wrote:

> The mere fact that federal courts normally have ancillary jurisdiction over garnishment proceedings does not demonstrate that they also have jurisdiction over disputed enforcement actions against third parties not present in the original action.

*En Banc* Opinion at 25 (Becker, J., concurring) (25a).

In his dissent to the *en banc* opinion of the Third Circuit in this case, Judge Stapleton persuasively argues that the Township should be viewed as a third party, even though it was a party to the original litigation because the disputed claim is based upon the collective bargaining agreement and was not asserted in the original litigation. *En Banc* Opinion at 32, n. 5 (Stapleton, J., dissenting) (32a).

In this case the enforcement claim was sufficiently separate from the primary litigation to prevent a federal court from exercising jurisdiction in the absence of independent jurisdictional grounds. The basis for the respondents' claim against the petitioner is based on the contractual relationship between the petitioner and the police officers as a result of the collective bargaining agreement. This issue we submit was summarily, and erroneously

3. In his dissent, Judge Stapleton maintained that although *Beecher* was decided before Rule 69 was adopted, it still should be viewed as valuable precedent. *En Banc* Opinion at 35 (Stapleton, J., dissenting) (35a).

disposed of by the district court. *See En Banc* Opinion at 26 (Becker, J., concurring) (26a). ("Neither do I believe that all claims for indemnification necessarily support ancillary jurisdiction . . . . Indemnification claims also may involve complex facts, questions of important state policy, and third parties absent from the principal litigation").

Petitioner submits that the indemnity issues raised by the eleventh-hour claim of the plaintiffs was not susceptible to the cursory review given by the district court.

> The issue of whether the officers' conduct came within the scope of the indemnity provision of the collective bargaining agreement could not appropriately be resolved by a finding that the the officers where "acting under color of state law".

*En Banc* Opinion at 43 (Stapleton, J., dissenting) (43a). The petitioner does not dispute that the jury found that the police officers were acting under color of state law for purposes of the civil rights violations alleged by the plaintiff. *See, e.g., Monroe v. Pape*, 365 U.S. 167, 187 (1961), *overruled on other grounds, Monell v. New York City Department of Social Services*, 436 U.S. 658 (1978) (whether one acts "under color of state law" determined by reference to whether one purports to act under authority conferred by state law). Petitioner submits, however, that it is not axiomatic that such a finding necessarily requires that the officers performed acts which were contemplated by them or the Township as part of their employment.

Petitioner submits that the view of the dissent that there was no reason to conclude that the provision in the collective bargaining agreement was intended to be coterminous with Section 1983's requirement of state action should be the view adopted by this Court. *See En Banc* Opinion at 43-44 (Stapleton, J., dissenting) (43a-44a).

## CONCLUSION

Wherefore, petitioner respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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**APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED JANUARY 22, 1987**

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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NO. 85-5300

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MARCOS SKEVOFILAX,
LOUISE SKEVOFILAX,
and MICHAEL MICHAELS

v.

SERGEANT WILLIAM QUIGLEY, PATROLMAN, CHARLES L. FEKETE, PATROLMAN DOMINICK SEMENZA, PATROLMAN FRED GALATI, PATROLMAN ROGER BOETTINGER, PATROLMAN DONALD MERKER, PATROLMAN WILLIAM REVILL, SERGEANT LOUIS LA PLAGA, SERGEANT HAROLD THOMAS, individually, and as police officers of the Police Department of Edison Township, New Jersey, WILLIAM T. FISHER, individually and as Chief of the Police Department of Edison Township, New Jersey, TOWNSHIP OF EDISON, NEW JERSEY, THE CAPTAIN'S WHEEL, INC. and GEORGE LEONTARAKIS

Township of Edison, Appellant

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Appeal from the United States District Court
for the District of New Jersey - Trenton
(D.C. Civil No. 79-2783)

---

*Appendix A*

Argued December 6, 1985
Before ADAMS, GIBBONS and STAPLETON,
*Circuit Judges*
Argued in Banc November 13, 1986
Before: GIBBONS, *Chief Judge*, SEITZ,
ADAMS,* WEIS, HIGGINBOTHAM,
SLOVITER, BECKER, STAPLETON,
MANSMANN, and ALDISERT,
*Circuit Judges*

(Filed January 22, 1987)

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* Hon. Arlin M. Adams, United States Circuit Judge, was present at oral argument but did not participate in the decision.

*Appendix A*

## OPINION OF THE COURT

GIBBONS, *Chief Judge*:

The Township of Edison, New Jersey appeals from a district court post-judgment order directing the township to pay a judgment entered in favor of Marcos and Louise Skevofilax and Michael Michaels against three co-defendant police officers employed by the township. The Skevofilaxes and Michaels obtained separate damage awards in the district court against both the individual police officers and the township.[1] Those awards are not challenged. At the time of the events giving rise to the lawsuit, the township employed the police officers under the terms of a collective bargaining agreement that provided that the township would provide "the necessary means for the defense" in any action arising out of or incidental to the performance of their duty. The collective bargaining agreement also provided that

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1. In the underlying proceeding the plaintiffs alleged that the defendant officers and the township had violated their constitutional rights and sought damages under 42 U.S.C. § 1983 (1982). The district court thus had subject matter jurisdiction. *See* 28 U.S.C. § 1331 (1982). The plaintiffs also pleaded pendent state law claims against the township for negligence and against the police officers for malicious prosecution. A seven-week trial produced a judgment in favor of appellee Skevofilax against the township for $74,964.14 for its negligence and against the police officers individually for $296,700.19 for their violation of his constitutional rights and $55,236.75 for malicious prosecution. Appellee Michaels obtained a judgment against the police officers individually for $11,000 for their violation of his constitutional rights and $1,000 for malicious prosecution. The district court, acting pursuant to 42 U.S.C. § 1988 (1982), also awarded a judgment for attorneys fees against the police officers individually in the sum of $199,521.00. No punitive damages were awarded and the question of punitive damages was not an issue in this case.

*Appendix A*

> [i]n the event of a judgment against a member of the bargaining unit arising out of or incidental to the performance of his duty, the Employer agrees to pay for said judgment or arrange for the payment of said judgment.

The collective bargaining agreement further provided that the employer

> agrees to continue to maintain in full force and effect all [liability] insurance now provided by the Employer for the benefit of, and covering Employees of the Employer and specifically Employees who are members of the bargaining unit covered by this Agreement.

The record before us makes it clear that the township contracted for liability insurance. We are called upon to decide whether, in light of the provisions of the collective bargaining agreement, the district court properly ordered the township to satisfy the judgments rendered against the individual defendant police officers.

I.

At the heart of this appeal lies a disagreement amongst the insurance carrier, the township, and the individual police officers. After the district court entered judgment in favor of the plaintiffs, the carrier refused to pay either the $74,964.14 award against the township or the awards totaling $563,457.94 against the police officers. The carrier apparently took the position that because the conduct of the police officers violated the criminal law of New Jersey, any indemnification agreement, embodied either in a collective bargaining agreement or in an insurance contract, was void as a violation of New Jersey public policy. Although that ground for resisting payment had

no relevance to the judgment against the township for negligence, the carrier nevertheless refused to pay the judgment against the township unless it first obtained from the officers a release of any right to indemnification they had under the collective bargaining agreement.

Since no payment was forthcoming, the plaintiffs, acting pursuant to Rule 69 of the Federal Rules of Civil Procedure, caused a writ of execution to be levied by the United States Marshal upon the township's bank account. At the same time and acting pursuant to the same Rule, they commenced garnishment proceedings upon the salaries of the police officers. In conjunction with these latter proceedings the district court held a hearing on April 15, 1985, at which time the plaintiffs notified the court that the police officers had commenced in the New Jersey Superior Court an action against the township to compel it to honor the indemnity undertaking contained in the collective bargaining agreement. They also notified the district court that the judgment against the township remained unpaid.

At the district court's suggestion the plaintiffs subsequently obtained and served upon the township an order directing it to show cause why it should not pay the judgments rendered against the individual police officers. The order provided for its service on the attorneys for the defendants on or before April 22, 1985, together with the papers on which the moving parties relied. These papers included the affidavit of Rafael Abramovitz, an attorney for the plaintiffs. The affidavit asserts that the collective bargaining agreement obliges the township, as a matter of contract, to pay the outstanding judgments against the individual police officers. Attached to the affidavit is a copy of the relevant portions of the collective

bargaining agreement between the township and its policemen. Also attached is a copy of the township's resolution implementing the collective bargaining agreement by authorizing the retention at township expense of attorneys for the defendant police officers in connection with an indictment growing out of the same incident giving rise to the suit. The resolution specifically acknowledged that "all of these defendants were police officers on active duty at the time of the incident charged in the indictment." Joint Appendix at 28.

The plaintiffs also served and filed a memorandum of law in support of their motion for an order compelling the township to pay the judgment against the police officers. That memorandum addressed the court's jurisdiction to issue such an order, and the township's contractual obligation to indemnify the officers.

When served with the order to show cause and supporting papers, the defendant police officers moved in writing to join in the plaintiffs' motion. In support of the plaintiffs' motion, the officers supplied to the district court and to counsel for the township copies of the brief they had filed in the New Jersey court in support of their own motion for summary judgment on their claim for contract indemnification.

On the return date of the order to show cause the township appeared, represented by two attorneys. One, Peter DeSarno, was the regular township attorney, and the other, Martin McGowan, was a member of the firm that the insurance carrier had retained on behalf of the defendants. The police officers had their own counsel. Neither DeSarno nor McGowan filed papers in opposition to the relief sought by the plaintiffs, nor did they request additional time to do so. Neither suggested that the district court should abstain from

deciding any legal issue that might have been resolved in the then-pending state court action. Both addressed the merits of the motion.

The township argued that the district court did not have jurisdiction to order the township to pay the judgments rendered against the individual defendants. Alternatively, it contended that the indemnity agreement in the collective bargaining agreement was void under New Jersey law. It did not claim that there were any issues of material fact concerning the construction of the indemnification clause. The record is unambiguous in this respect. Mr. DeSarno spoke on behalf of the township with respect to the indemnification claims. His argument with respect to the collective bargaining agreement, in full, was as follows:

> THE COURT: What about your collective bargaining agreement? What did you do with that[?]
>
> MR. DE SARNO: It has to be read in connection with the statute, Judge.
>
> THE COURT: Oh, you mean you make [an] agreement with your employees, and then you later take it and shove it at them [like] that[?]
>
> MR. DE SARNO: Judge, it is strictly a state matter. The *Moya* case settles the issues. The *Moya* case talks about when . . . officers are entitled to be represented[;] it talks inferentially about the obligations that may be the obligation[s] of the municipality. This is willful, wanton action. If there is coverage, I have suggested to the counsel for the officers, as a matter of fact, who is taking the burden of these plaintiffs, that he ought to join the carrier. There might be some coverage, but to

say that the Township itself directly is liable. I think is incorrect, and it is against all the law of New Jersey.

THE COURT: What? Your collective bargaining agreement?

MR. DE SARNO: What about it, Judge?

THE COURT: Would you please explain to me the effect of a collective bargaining agreement on this?

MR. DE SARNO: The collective bargaining agreement merely recites the statute, it talks about obligations, you have to read it in the context of the whole position, 40(a). It really recites the statute about whether they are entitled to be represented. Then it goes on to say that the first part of that section they pulled out wasn't put into the brief, I have it in brief which I don't have but when you read it all in context, what it suggests, and I suggest this to your Honor, collective bargaining agreement is not dispositive of ultimately the issue in this case. It depends what the Constitution permits us to do and what other statutory authority permits us to do. It does not permit us to pay this kind of judgment.

THE COURT: "In the event of a judgment against a member of the bargaining unit arising out of or incidental to the performance of his duty, the employer agrees to pay for said judgment or arrange for the payment of said judgment." What could be clearer than that[?]

MR. DE SARNO: Assuming that it could be done within the framework of the Constitution of New Jersey, and when the statutory authority of a

> municipality. You have to assume that, Judge, and you can't do it.
>
> THE COURT: You mean you entered into [an] agreement with your employees violative of both the Constitution and the statute[?]
>
> MR. DE SARNO: That is not unusual, Judge, in collective bargaining agreements.
>
> THE COURT: Oh, Mr. DeSarno.
>
> MR. DE SARNO: There are not a managerial things that contracts are not enforceable. You are reading it too strictly. You are not understanding the framework of the state law that surrounds itself.

Joint Appendix at 100-02.

The colloquy between court and counsel discloses clearly that the court understood counsel to be arguing not that the indemnity clause on which plaintiffs relied was in fact inapplicable, but that, assuming it was, the clause was illegal. The court's understanding of the township's argument was reiterated later in the hearing, when Mr. Abramovitz, the plaintiffs' attorney observed:

> MR. ABRAMOVITZ: Yes. If he is challenging the clear and obvious clause in the contract, I think the words defeat him. The contract is beyond dispute.
>
> THE COURT: I think his argument, and I could be wrong, but I think his argument is, you know, the contract is fine, which the laws of the State of New Jersey say that they are not required to compensate for. I think that is his argument.

*Id.* at 105-06. Mr. De Sarno made no objection to this characterization of his position on the contract. No

issue of contract interpretation was ever clearly tendered to the district court.

Mr. DeSarno did contend that the district court should not decide the indemnity issue, but that argument appears to have been addressed to the township's jurisidictional contention. From what appears in the transcript of the argument, the township seems to have urged that because the indemnification question had not been litigated during the trial, it could not be litigated in a proceeding under Fed. R. Civ. P. 69. The following exchange occurred:

> MR. DE SARNO: But your Honor, the judgment you are enforcing is not against the Township of Edison. That is the problem. There was never a judgment entered against the township except in one respect. Now you --
>
> THE COURT: I can enforce it against the Township of Edison.
>
> MR. DE SARNO: You are litigating an issue that was never raised in the trial before, your Honor. It is a separate, distinct issue.
>
> THE COURT: It was never an issue in the trial.
>
> MR. DE SARNO: It was never an issue, that's right.
>
> THE COURT: Why should it have been an issue in the trial? Who is going to pay an obligation that nobody doubted the Township of Edison was going to pay, or its carrier?

Joint Appendix at 103.

The court explained that at trial it had been stipulated that the police officers had been acting in

the course of their duties, and without objection the court instructed the jury as follows:

> I charge you that the defendant police officers do not contest the facts that whatever actions they took with respect to plaintiffs Marcos Skevofilax and Michael Michaels, they did so in their capacity as officers of the police force of the Township of Edison.

The township could have objected both to the stipulation and to the instruction, since they bore not only on the fourteenth amendment state action issue but also on the state law negligence claim against it. It was the trial court's recollection that the attorney for the township stipulated and agreed to the instruction. The township attorney contended otherwise, but offered no supporting affidavit or transcript reference. The court chose not to resolve the dispute over the stipulation, however, but instead ruled that as a matter of law the indemnity agreement applied.

Having rejected the township's jurisdictional arguments and its New Jersey public policy arguments, the district court ordered the township to do the following:

> a) To pay and satisfy the portion of said judgment entered against the individual police officers in favor of plaintiff Marcos Skevofilax for compensatory damages, as reduced by the remittitur in the sum of $296,700.19;
>
> b) To pay and satisfy the portion of said judgment entered against the individual police officers in favor of Marcos Skevofilax in the amount of $55,236.75, being the judgment for compensatory damages as reduced by the remittitur entered by reason of malicious prosecution;

*Appendix A*

c) To pay and satisfy the portion of the said judgment entered against the Township of Edison in favor of Marcos Skevofilax in the amount of $74,964.14, for compensatory damages for the negligence of said Township[;]

d) To pay and satisfy the portion of said judgment entered against the individual police officers in favor of Michael Michaels in the amount of $11,000.00 for compensatory damages for the negligence of said Township[;]

e) To pay and satisfy the portion of said judgment entered against the individual police officers in favor of Michael Michaels in the amount of $1,000.00 being the judgment for compensatory damages for malicious prosecution[;]

f) To pay the plaintiff the sum of $3,048.70 which is the amount entered by the Clerk of the Court for costs in this action;

g) To pay all above stated sums with interest at the rate of 11.74% from May 31, 1984, being the date of entry of judgment, to the present[;]

h) To pay to the plaintiffs the sum of $199,521.00, being the amount of attorneys fees awarded by this Court[;]

i) To pay to the plaintiffs the sum of $5,706.45, being the amount of disbursements previously awarded by this Court[;]

j) To pay the sums listed in h and i hereof, with interest at the rate of 11.74% from November 28, 1984[;]

k) To pay to plaintiff's [sic] additional attorneys fees and disbursements in the amount of $3,763.00.

*Appendix A*

Skevofilax v. Quigley, Civ. Action No. 79-2783 (D.N.J. April 25, 1985)(order).

II.

The township objects to that portion of the order requiring it to pay the judgments rendered against the individual officers.[2] It advances the same arguments that it proffered to the district court -- that the district court lacked jurisdiction to enter the order and that, even if the court had the requisite jurisdiction, it erred in holding that the indemnity provision in the collective bargaining agreement was enforceable with respect to the instant judgment.[3]

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2. After the notice of appeal was filed the insurance carrier acknowledged its obligation to pay the $74,964.14 negligence judgment against the township. The township then paid that amount, but did so only after the district court entered an order directing the First National State Bank of Edison to turn over to the United States Marshal funds in the township's bank account.

3. In a document captioned "Certification of Peter DeSarno," filed in this court in support of an application for a stay of execution without a supersedeas bond, the township noted the contract indemnity provision and stated:

> As previously indicated the three officers in question were off duty, out of uniform, in a bar and were engaged in a fight which resulted in all three being disciplined by the Township, one convicted of assault and battery. It is the Township's position that the judgment entered against these individuals is not covered by the above referenced contract provision.

Joint Appendix at 45. This "certification" was never presented to the district court and, as indicated in the text above, the township never argued at trial that the indemnity clause did not cover the activities in question. We were advised at oral argument that the defendant police officers have obtained summary judgment in their action pending in New Jersey court to enforce the collective bargaining agreement's indemnity clause.

*Appendix A*

A.

The township's jurisdictional argument starts with the preamble to the district court order, which expressly referred to Rules 69 and 70 of the Federal Rules of Civil Procedure. That reference, the township urges, confines the "jurisdictional" dispute to an inquiry into the district court's authority to issue orders in aid of enforcement of its judgment.

The appellees respond that even if one looks only at the court's authority to enforce its judgment that authority is broad enough to sustain the district court order. They point out that Rule 69 cross-references to "proceedings supplementary to and in aid of judgments" of the state in which the district court is held. In light of this language and New Jersey law, they contend, Rule 69 authorizes a district court to order a debtor of a judgment debtor to pay a judgment rendered against the judgment debtor.

The New Jersey statutory scheme for the enforcement of a judgment against rights and credits of a judgment debtor is clear:

> Rights and credits of a defendant in execution . . . may be levied upon, taken and sold or collected by virtue of such execution . . . .

N.J. Stat. Ann. § 2A:17-59 (West 1952).

> In lieu of a sale, the officer levying the execution may, in his own name as such officer, liquidate such rights and credits by collection, or, with the assent of the judgment creditor and subject to the provisions of this article, in any other manner.

N.J. Stat. Ann. § 2A:17-61 (West 1952).

> For the purpose of liquidation the officer levying the execution shall, at the request of the judgment creditor, sue or take proper judicial proceedings,

> in his own name as such officer, to obtain such recovery or relief as defendant or a receiver of defendant would be entitled to.

N.J. Stat. Ann. § 2A:17-62 (West 1952). This last-quoted provision authorizes the adjudication of a dispute between a judgment debtor and a third party so as to assure the satisfaction of a judgment. *See Barrett Co. v. United Building & Construction Co.*, 5 N.J. Misc. 87, 88, 135 A. 477, 478 (1926); *Sebring v. Pratt*, 91 N.J.L. 393, 393-94, 103 A. 999, 999 (1918); *Johnson v. Lyon*, 103 N.J. Eq. 315, 143 A.373, 374 (Ch. 1928).

The township urges that the liquidation procedure prescribed by section 2A:17-62 may not be utilized for the enforcement of a federal court judgment because that statutory provision cannot enlarge federal court jurisdiction. Obviously, however, neither the liquidation provision in section 2A:17-62, nor the more summary remedy in section 2A:17-59, nor any other New Jersey statute has anything at all to do with federal court jurisdiction. Those statutes, however, constitute "[t]he practice and procedure [of execution] of the state in which the district court is held." Fed. R. Civ. P. 69(a). By virtue of Rule 69 the same relief is available in federal court for the satisfaction of a federal court judgment as would be available in a state court. Rule 69 does not contemplate that the holders of federal judgments must resort to state tribunals for their enforcement. *Green v. Benson*, 271 F. Supp. 90, 93 (E.D.Pa. 1967)(holding that district court had ancillary jurisdiction to adjudicate garnishment action by a judgment creditor against the nonparty insurer of a judgment debtor).

It should be noted that a holding that a federal tribunal lacks ancillary jurisdiction to enforce its own judgment would be equally applicable to the district

court's effort to garnish the township's bank account. The bank is in the same debtor relationship to the township as the township is to the individual police officers. Thus, although in this case the township eventually paid the judgment rendered against it after the garnishment of its bank account, in the future, under the jurisdictional rule the township proposes, such a garnishment would not be possible in the absence of a separate basis of federal subject matter jurisdiction over the garnishee bank. Even the fact that the garnishee may not dispute the debt would not be dispositive, for the summary remedy specified in section 2A:17-59 and the liquidation remedies specified in section 2A:17-61 would be equally subject to the township's proposed requirement of a separate basis of federal subject matter jurisdiction over the garnishee. Since such a separate basis of subject matter jurisdiction will rarely exist, the effect of the township's position would be that in almost all cases federal courts would be unable to enforce their judgments by resort to garnishment process.

The untoward consequences of insistence upon a federal district court possessing an independent basis of subject matter jurisdiction over a garnishee would not be confined to efforts at post-judgment enforcement. Under Rule 64 of the Federal Rules of Civil Procedure, prejudgment in rem and quasi in rem remedies are available "under the circumstances and in the manner provided by the law of the state in which the district court is held[.]" Fed. R. Civ. P. 64. The township's proposed approach would mean that such remedies would be available only in one instance -- a case in which there is complete diversity between the plaintiff and both the defendant and the garnishee. Garnishment or any similar provisional prejudgment remedy could never be available in a federal question case, for there would be no federal question claim

against the party subject to the prejudgment seizure. In fact, such a claim would only exist against the defendant. Yet Rule 64 provides explicitly for prejudgment garnishment and obviously contemplates its availability in diversity cases as well as in federal question cases. The township's proposed rule would make this remedy unavailable in the latter class of cases. No interests of the United States, or of the states in the federal union suggest such a patently unsound ancillary jurisdiction rule. The township's reference to interests of comity is totally unpersuasive in the absence of some reference to an interest of the State of New Jersey which would be offended by permitting a federal court to take the steps required to enforce its judgments. A rule requiring that there be a separate state lawsuit to enforce a federal court judgment by garnishment process would actually impair any identifiable interest of that state. It would impose on the state courts the role of serving as an auxiliary or adjunct to the district court by cleaning up the loose ends of a district court lawsuit.[4]

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4. The township finds support for its proposed limitation of the district court's judgment enforcement powers in H.C. Cook Company v. Beecher, 217 U.S. 497 (1910). That opinion, by Justice Holmes, is a typically delphic pronouncement. It states the result, but not the reasons for that result. Justice Holmes probably intended the opinion to be an interpretation of the then-governing statute, the Conformity Act of 1872, ch. 255, 17 Stat. 196. If it was so intended, *Beecher* is wholly irrelevant to the issue of ancillary jurisdiction exercised pursuant to Rule 69, a rule that was not drafted until after enactment in 1934 of the Rules Enabling Act, Pub. L. No. 416, 48 Stat. 1064 (codified at 28 U.S.C. § 2072 (1982)). If, on the other hand, Justice Holmes intended his opinion to serve as a pronouncement on the constitutional limits of ancillary jurisdiction, he certainly kept that intention to himself, for it is nowhere mentioned in the opinion. Thus, beyond its superficial factual similarity, *Beecher* bears no resemblance to this case before us and lends no support to the township's jurisdictional position.

The township also contends that, because it disputes its liability under the collective bargaining agreement, there is no method under New Jersey law to enforce against it the judgment against the police officers. In making that assertion it relies on *National Cash Register Co. v. 6016 Bergenline Ave. Corp.*, 140 N.J. Super. 454, 457, 356 A.2d 447, 449 (App. Div. 1976)(per curiam). That case, however, concerns the summary turnover procedure authorized by N.J. Stat. Ann. § 2A:17-63 (West 1952). It does not address the question whether a claim against a debtor of the judgment debtor can be reached by virtue of the liquidation provision in N.J. Stat. Ann. § 2A:17-62 (West 1952).

We hold, therefore, that the district court has ancillary jurisdiction to adjudicate a garnishment action by a judgment creditor against a nonparty to the original lawsuit which may owe the judgment debtor an obligation to indemnify against the judgment, or any other form of property.[5]

B.

Entirely apart from the court's authority under Rule 69 and New Jersey law, there is in this case a separate basis for ancillary jurisdiction over the dispute with respect to the township's obligation to indemnify the police officers. Had the carrier in the pre-judgment stage asserted on behalf of the township that it would not honor the contractual indemnity agreement in the collective bargaining agreement, it would have been appropriate for the police officers to file a cross-claim against the township for contract indemnification pursuant to Rule 13(g). *See, e.g., Thomas v. Malco Refineries, Inc.*, 214 F.2d 884, 886

5. Judges Weis, Higginbotham, Sloviter, and Aldisert join in this holding.

(10th Cir. 1954); *President & Directors of Georgetown College v. Madden*, 505 F.Supp. 557, 593-95 (D.Md. 1980), *aff'd in part and dismissed in part*, 660 F.2d 91 (4th Cir. 1981); *Coyne v. Marquette Cement Manufacturing Co.*, 254 F.Supp. 380, 388 (W.D.Pa. 1966); 6 C. Wright and A. Miller, Federal Practice and Procedure § 1431, at 169 (1971). There is no time limit on the filing of such a cross-claim, and a district court may separate its adjudication from the main trial. *See* Fed. R. Civ. P. 42(b).[6]

When the police officers joined in the plaintiff's motion, they in effect made a Rule 13(g) cross-claim against the township even though they did not formally so designate their claim. The fact that the officers filed their cross-claim after the adjudication of the main claim does not in these circumstances eliminate the district court's ancillary jurisdiction to consider it. *Blackburn Truck Lines, Inc. v. Francis*, 723 F.2d 730, 732 (9th Cir. 1984).[7] Nor does the existence of the

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6. Furthermore, the township could have moved pursuant to Rule 14(a) to join the carrier as a third party. *See, e.g.*, Government Employees Ins. Co. v. United States, 400 F.2d 172, 174 (10th Cir. 1968); Southern Farm Bureau Casualty Ins. Co. v. United States, 395 F.2d 176, 179-80 (8th Cir. 1968); Impex Agricultural Commodities Div. Impex Overseas Corp. v. Parness Trucking Corp., 576 F.Supp. 587, 591 n.2 (D.N.J. 1983). Impleading would have been proper even if the carrier had been conducting the defense, so long as the carrier contested its indemnification liability. Rosalis v. Universal Distributors, Inc., 21 F.R.D. 169, 172 (D. Conn. 1957); 6 C. Wright and A. Miller, Federal Practice and Procedure § 1449, at 267 (1971).

7. The conclusion that the district court had ancillary subject matter jurisdiction over this cross-claim draws additional support from Barrow v. Hunton, 99 U.S. 80 (1878), in which the Supreme Court held that a judgment debtor's attack on a judgment rendered by a state court could not be removed to federal court because such an attack was ancillary to the original state proceeding. *See id.* at 83-85. Neither a state court nor a federal court must depend upon the other for the enforcement of a judgment.

additional procedural requirements for the post-judgment amendment of pleadings preclude the exercise of such jurisdiction, for those procedural difficulties do not bear upon the district court's subject matter jurisdiction and thus lend no support to the township's deficient analysis of the scope of ancillary jurisdiction.[8]

Defects, if any, in the proceedings resulting in the order appealed from were at most procedural, not jurisdictional. Whether one approaches the matter as a Rule 69(a) proceeding or as a Rule 13(g) proceeding, the township was entitled to a procedure appropriate to the nature of the dispute, which was limited to the issue of the legality under New Jersey law of the township's indemnity undertaking. The township tendered no disputed issues of material fact, and it never urged that it required a more adequate opportunity to marshall its legal arguments, even after the district court pointed out that it had filed no responsive papers. Indeed the township's legal position was presented to the district court in substantially the same manner as it is presented on appeal.[9] Thus any procedural irregularities resulting from the summary manner in which the district court resolved the dispute over the township's indemnification undertaking must

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8. Because Judges Sloviter and Higginbotham are satisfied that the federal jurisdiction that supported the original claim supports federal jurisdiction to enforce the judgment, they believe it is unnecessary to reach the question whether the ancillary jurisdiction over a Rule 13(g) cross-claim extends to a cross-claim raised after judgment is entered. Therefore, they do not join in Part II.B. of the opinion.

9. Arguably, under N.J. Stat. § 2A:17-61 (West 1952), the United States Marshal should have been named a nominal party to the garnishment proceeding. The Township does not contend, however, that the absence of such a nominal party resulted in prejudice. *See* Fed. R. Civ. P. 17(a).

be regarded as harmless. "[A]t every stage of the proceeding [we] must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties." Fed. R. Civ. P. 61.

III.

Our holding that the district court had ancillary jurisdiction requires that we address the merits of the township's objection to the district court's disposition of the dispute over the indemnification agreement. The sole substantive defense that the township offered in the district court was that the collective bargaining agreement, if construed to mean what it unequivocally says, would be illegal under New Jersey law. That position is without merit.

The New Jersey courts have expressly held enforceable a municipality's obligation, contained in a collective bargaining agreement, to indemnify city officers for compensatory damage awards arising out of unlawful acts. *See City Council v. Fumero*, 143 N.J. Super. 275, 362 A.2d 1279 (Law Div. 1976). At issue in *Fumero* was a municipality's obligation under a collective bargaining agreement -- indistinguishable for purposes of this appeal from the one between the Township of Edison and its police officers -- to defend and indemnify municipal officers who were defendants in a section 1983 suit. The municipality had sought a declaratory judgment against its insurance carrier and the defendant officers after the carrier had refused to defend the officers. With respect to the enforceability of the collective bargaining agreement's indemnification provision, the New Jersey court wrote:

> The collective bargaining agreement also addressed itself to the issue of indemnification for judgments which might be recovered against members of the bargaining unit. Counsel have not

> referred to any statutory provision which addresses itself to this issue. In the absence of a controlling statute, the terms of the contract control the rights of the respective parties. The agreement presently before the court requires the municipality to indemnify the individual officers for a judgment of compensatory damages. No right of indemnity exists if a judgment for punitive damages is returned. Such a contractual provision is in accord with public policy.

*Id.* at 284, 362 A.2d at 1283-84 (citations omitted). The court also held that the insurance carrier was obliged under its policy to defend and indemnify the police officers. *Id.* at 288, 362 A.2d at 1285.[10]

Relying on *Moya v. City of New Brunswick*, 90 N.J. 491, 448 A.2d 999 (1982), and *Valerius v. City of Newark*, 84 N.J. 591, 423 A.2d 988 (1980), the township contends that the indemnification clause is contrary to New Jersey public policy and is therefore unenforceable. The authorities cited by the township have no bearing upon this appeal. They deal with the entirely distinct matter of the *statutory* obligation to defend and indemnify imposed upon municipalities and other government agencies by the New Jersey Tort Claims Act. *See Moya*, 90 N.J. at 495, 448 A.2d at 1001; *Valerius*, 84 N.J. at 593, 423 A.2d at 989. The statutory liability at issue in *Moya* and *Valerius* has nothing to do with the legality of a contract indemnification undertaking.

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10. That *Fumero* is undoubtedly still a correct statement of New Jersey law with respect to contract indemnification is evidenced by the recent New Jersey Supreme Court decision in Moya v. City of New Brunswick, 90 N.J. 491, 448 A.2d 999 (1982), in which that court made clear that a collective bargaining agreement may afford the type indemnification that the township contests here. *See id.* at 505 n.8, 448 A.2d at 1006 n.8.

*Appendix A*

*Fumero* is dispositive of the issue of the enforceability of the indemnification clause at issue in this case. Thus we reject the township's contention that the district court erred as a matter of law in holding that the indemnification clause required the township to satisfy the judgments rendered against the individual police officers.

IV.

The district court had ancillary jurisdiction to proceed against the township by garnishment proceedings to enforce the township's contract indemnification undertaking. Both Rule 69(a) and Rule 13(g) provide procedural mechanisms for the exercise of that ancillary jurisdiction. The district court's holding that the township owed a duty to indemnify the officers and that the judgment creditors of the defendant police officers could reach the township and enforce that duty is consistent with New Jersey law. The order appealed from will therefore be affirmed.

BECKER, *Circuit Judge*, concurring.

I agree that the district court had ancillary jurisdiction over the police officers' claim against the township. I also agree that New Jersey law provides a procedural mechanism by which the district court, under rule 69, could adjudicate the indemnification claim. Accordingly, because I join in the majority's discussion of the merits (Part III), I vote to affirm the judgment of the district court. I write separately, however, because I believe that Judge Gibbons' discussion of ancillary jurisdiction, while conceptually sound in many particulars, cuts too broadly.

Although Judge Gibbons divides his jurisdictional discussion into a garnishment analysis under Rule 69 and a cross-claim analysis under Rule 13(g), I do not believe that the procedural rule alters the basis of ancillary jurisdiction. The issue of jurisdiction is separate from the issue -- properly decided by the majority -- of whether the rules provide a procedural mechanism by which the court could decide the indemnification issue. *See Finkle v. Gulf & Western Mfg. Co.*, 744 F.2d 1015, 1018 (3d Cir. 1984) ("Although the claims presented in this case were authorized by the Federal Rules of Civil Procedure, we must still decide whether there is federal subject matter jurisdiction over them.") Although the police officers' claim must satisfy both the requirements of jurisdiction and of the procedural rules, the Federal Rules of Civil Procedures may neither extend nor contract federal jurisdiction. Fed. R. Civ. P. 82.

As discussed more fully *infra*, a proper analysis of jurisdiction in this case should flow from the conventional criteria for ancillary jurisdiction not from broad analogies to garnishment or to cross-claims. Because specific applications of ancillary jurisdiction may themselves implicate the limits of federal power, broad analogies, such as those employed by the

majority, are problematic. *Compare Finkle*, 744 F.2d 1015 (allowing exercise of ancillary jurisdiction over plaintiff's Rule 13(a) counterclaim against a non-diverse, impleaded third party) *with Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365 (1978) (rejecting exercise of ancillary jurisdiction over plaintiff's Rule 14(a) claim against a non-diverse, impleaded third party).

I.

Judge Gibbons' opinion appears to assume the broad proposition that a federal court has ancillary jurisdiction over any effort to enforce its judgments regardless of whether the adjudication of the defendant's claim for funds involves facts and defendants unrelated to the original dispute. Judge Gibbons analogizes such enforcement actions to garnishment. But garnishment proceedings, as the New Jersey example demonstrates, *see* N.J. Stat. Ann. § 2A:17-63, generally cannot encompass disputed or unliquidated claims, *see* 6 Am. Jur 2d *Attachment & Garnishment* §§ 126-27 (1963 & Supp. 1986), so they do not involve truly separate litigations. The mere fact that federal courts normally have ancillary jurisdiction over garnishment proceedings does not demonstrate that they also have jurisdiction over disputed enforcement actions against third parties not present in the original action.

Many enforcement actions are not truly ancillary. That the original parties pursue an action to provide the defendant with funds for satisfaction of the original judgment does not itself provide a sufficient nexus to the original dispute. In a converse situation, federal courts have faced the question whether a state court enforcement action is sufficiently separate from the original litigation that it may be removed to federal court if it presents a proper basis for federal

jurisdiction. *See* 1A J. Moore, B. Ringle & J. Wicker, *Moore's Federal Practice* ¶ 0.167[12.--3], at 526 (2d ed. 1986) (citing cases). Just as a state enforcement claim may be sufficiently separate from the principal litigation to justify removal upon independent jurisdictional grounds, a federal enforcement claim may be sufficiently separate to prevent a federal court from exercising jurisdiction in the absence of independent jurisdictional grounds.

I can easily imagine a situation where ancillary jurisdiction would be in serious doubt -- for example, the post-judgment pursuit of a questionable gambling debt allegedly due the defendant from a non-diverse party who was not involved in the principal litigation. This hypothetical action would require the resolution of both factual questions, such as the existence of the contract giving rise to the indebtedness and the potential interposition of an affirmative defense concerning capacity to contract, and legal issues of significant state concern, such as the public policy concerning collection of gambling debts. Under general principles of ancillary jurisdiction, discussed *infra*, such a claim would probably not be ancillary but would be a separate claim triable only in state court. *Ambromovage v. United Mine Workers of America*, 726 F.2d 972, 989-91 (3d Cir. 1984). Neither do I believe that all claims for indemnification necessarily support ancillary jurisdiction, as the majority explicitly holds. Indemnification claims also may involve complex facts, questions of important state policy, and third parties absent from the principal litigation.

II.

Rather than sanctioning a potentially expansive, fixed rule of ancillary jurisdiction designed to foster implementation of Rule 69, I believe that we should apply conventional principles of ancillary jurisdiction

to the particular facts of this case. The primary justification for ancillary jurisdiction is "the judicial reality that [some] multiple claims are most efficiently disposed of in a single proceeding." *Ambromovage*, 726 F.2d at 989. Accordingly, the first criterion for ancillary jurisdiction is always whether the ancillary and principal claims hinge on a "common nucleus of operative fact." *Id.*, *citing United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966); *see also* American Law Institute, *Study of the Division of Jurisdiction Between State and Federal Courts*, § 1313(a), at 28, & commentary, at 208-12 (1969). A court should also inquire whether exercise of jurisdiction would violate a federal policy and whether a balance of prudential factors, such as "convenience, judicial economy . . . fairness to litigants and . . . interests of federalism," calls for a federal forum. *Ambromovage*, 726 F.2d at 990 & n.53.

In this case, these prudential factors justify the district court's exercise of jurisdiction. The Rule 69 proceeding required an analysis of the same factual events at issue in the principal litigation. Even the ultimate determination of whether the policemen were acting in the scope of their duties and were covered by the collective bargaining agreement related to the question in the original litigation of whether the officers were acting under color of state law. Moreover, no federal policy counsels against jurisdiction of the indemnification claim. In sum, many of the same factors that would justify jurisdiction of the indemnification claim if it had been timely asserted as a cross-claim under Rule 13(g) continue to justify jurisdiction over the Rule 69 claim.

The mere fact that jurisdiction would have been proper if the claim were made earlier, however, does not make it proper here. In many situations, the balance of convenience, judicial economy and fairness

that generally justifies ancillary jurisdiction might not justify a claim brought after the initial litigation is over.[1] For example, a fact-specific, disputed claim against a new, unrelated third party asserted after the end of the principal litigation will rarely save judicial resources by being attached to the original litigation because the new party is entitled to relitigate any questions of fact relevant to its liability.

The facts of this case, however, justify jurisdiction despite the late assertion of the indemnification claim. First, interests of convenience and judicial economy are satisfied. The Rule 69 action involves no parties absent in the initial action who are entitled to relitigate factual contentions already resolved in the principal action. To the extent that the new claim involves any factual questions, they are virtually the same as those already contested, and the new claim brought no demand for a jury trial or other significant procedural burden. Thus, the district judge could consider the evidence adduced in the initial proceedings and speed resolution of the indemnification dispute.

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1. Judge Gibbons asserts that because there is no time bar on the filing of a cross-claim, jurisdiction is proper in this case. But this argument confuses the requirements of our rules of procedure with the separate requirements of jurisdiction.. Furthermore, although there is no fixed time bar to cross-claims, courts still weigh prudential considerations in deciding whether to accept late cross-claims. *See* 6 C. Wright and A. Miller, Federal Practice and Procedure § 1431, at 169 (1971). Even if I were to apply Judge Gibbons' analogy to time restrictions on Rule 13(g), and even assuming that cross-claims may be made after settlement of the principal claim, I would still weigh interests of convenience and fairness in deciding whether to permit this constructive cross-claim. However, because I find that Rule 69 provides the procedural mechanism to implement ancillary jurisdiction, I need not consider the alternate procedural mechanism of Rule 13(g).

Second, interests of fairness counsel strongly in favor of jurisdiction. The record makes plain why the policemen did not assert their cross-claims against the township in the original litigation: the Township's insurance carrier controlled the lawsuit, and selected and paid counsel for both the Township and the police officers. When the insurance carrier assumed the defense of the policemen, it created the impression that the indemnification clause of the collective bargaining agreement applied. Yet, neither the Township nor its insurance company gave any indication before or during trial that either would disregard the obligation under the collective bargaining agreement to pay a judgment against the police officers. As Judge Barry commented at the hearing to show cause, "There was never any doubt in anyone's mind in this courtroom, that the Township was going to pick up the freight, and in fact I was advised so in a number of conversations." Joint Appendix at 99; *see also* Joint Appendix at 103 (quoted in the Majority Opinion at typescript 11). Under these circumstances, fairness also militates in favor of jurisdiction.

III.

Under the facts, adjudication of the enforcement phase of this case involved a common nucleus of operative fact with the underlying claim, impinged on no federal policy, and advanced convenience, judicial economy and fairness. I therefore believe that the district court properly exercised ancillary jurisdiction over the indemnification claim pursuant to the Rule 69 judgment execution procedure; hence I concur in the judgment of the court.

*Appendix A*

STAPLETON, *Circuit Judge*, dissenting, with whom Judges Seitz and Mansmann join.

I agree with the majority that a United States district court has ancillary jurisdiction to execute on its judgments.[1] I further agree that Federal Rule of Civil Procedure 69 governs how that ancillary jurisdiction is to be exercised, namely "in accordance with the practice and procedure of the state in which the district court is held." The "practice and procedure" in New Jersey, however, does not authorize what transpired in this case. Nor does Rule 13(g). Accordingly, I respectfully dissent.

A.

New Jersey courts are authorized by statute to execute on judgments. The judgment debtor's real estate, chattels, rights, and credits may be seized and sold to satisfy the judgment. More relevant for present purposes, an obligation of a third party to the judgment debtor may be garnished. When this occurs, however, the court has jurisdiction to order the garnishee to pay the judgment creditor *only* "if the garnishee admits the debt."[2] The New Jersey "practice and procedure" on this point is tersely summarized by

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1. As the Supreme Court declared in 1868,

> Process subsequent to judgment is as essential to jurisdiction as process antecedent to judgment, else the judicial power would be incomplete and entirely inadequate to the purposes for which it was confered by the Constitution. *Riggs v. Johnson County*, 73 U.S. (6 Wall.) 166, 187 (1868).

2. N.J. Stat. Ann. § 2A:17-63 provides:

> After a levy upon a debt due or accruing to the judgment debtor from a third person, herein called the garnishee, the court may upon notice to the garnishee and the judgment debtor, *and if the garnishee admits the debt*, direct the debt, to an amount not exceeding the

*Appendix A*

Professor Jennings in his New Jersey practice guide as follows:

> The garnishee must admit the debt, or the Court has no jurisdiction to order him to pay it over. Beninati v. Hinchliffe, 1256 NJL 587, 20 A 2d 64 (E & A 1941).[3] If the garnishee denies the debt, the proper practice is for the sheriff or a receiver to sue the garnishee. N. Drake, Inc. v. Donovan, 8 Misc. 869, 152 A 337 (Sup Ct 1930); Barrett Co. v. United Bldg. & Constr. Co., 5 Misc. 87, 135 A 477 (Sup Ct 1926)[4]; Sebring v. Patt, 91 NJL 393, 103 A 999 (Sup Ct 1918).

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sum sufficient to satisfy the execution, to be paid to the officer holding the execution or to the receiver appointed by the court, either in 1 payment or in installments as the court may deem just. (Emphasis supplied.)

3. The Court of Errors and Appeals put it this way in the *Beninati* case:

> Where there is a levy on rights and credits under the statute here involved, R.S. 2:32-178, N.J.S.A. 2:32-178, a section of the district court act, or under the executions act, R.S. 2:26-179 and 180, N.J.S.A. 2:26-179, 2:26-180, and a rule is issued against the garnishee and the judgment debtor, an order directing the garnishee to pay the money over may be made only when the garnishee admits the debt is due the judgment debtor. "Upon the return of the rule to show cause, an order may be made requiring the garnishee to pay said debt, 'if he admits it.'" First Mechanics', etc., Bank v. New Jersey Brick & Supply Co., 112 N.J.L. 218, 171 A. 176, 177. "The words 'an order may be made requiring the garnishee to pay said debt, if he admits it, to the officer,' make the admitting of the debt a jurisdictional sine qua non." N. Drake, Inc. v. Donovan, 152 A. 337, 339, 8 N.J.Misc. 869; Barrett Co. v. United Building Construction Co., 135 A. 477, 5 N.J.Misc. 87.

20 A.2d at 66.

4. In the *Barrett Co.* case, relied upon by the majority, the Supreme Court of New Jersey refused to approve an order directing

*Appendix A*

E. J. Jennings, *Practice-Law Division*, published as Volume 3A, Seltzer, *New Jersey Law With Forms*, § 14.02 at 14-502 (1982) (footnote added); *see also* 4 M. B. Blackner and D. W. Hansen, *New Jersey Practice*, § 1930 (1980).

Thus, where, as here, the third party who allegedly owes the judgment debtor denies the debt, New Jersey "practice and procedure" calls for the institution of an independent action by appropriate pre-judgment process. This is apparent on the face of N. J. Stat. Ann. §§ 2A:17-61 and -62, the statutes relied upon by the majority. Unlike the garnishment statute, § 2A:17-63, these statutes authorize the initiation of litigation, not post-judgment process in aid of execution. The majority chooses to gloss over this distinction presumably because it wishes to facilitate the collection of federal judgments in New Jersey. While this objective may be a desirable one, I believe the United States District Court for the District of New Jersey should be able to point to some specific authority before it asserts the right to resolve a state law claim against a third party[5] who could not be forced

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the garnishee to pay the judgment creditor where the garnishee did not admit the debt. It explained the relevant New Jersey practice as follows:

> [T]he rights and credits levied on (in this case the claim to a retained percentage) must be liquidated, to use the language of the statute, by a suit, either in the name of the sheriff or of a receiver. This was the course pursued in Sebring v. Pratt, 92 N.J. Law, 393, 103 A. 999, and seems to be the only way of judicially settling the question whether the borough is liable to those claiming under the contractor, and, if so, to what extent.

135 A. at 478.

5. While the Township was a party to the original litigation, I view it as a third party with respect to the claim based upon the collective bargaining agreement, which was not asserted in that litigation. In any event, the rationale of the majority would apply to

to litigate in a federal court but for the fortuity that his creditor has suffered a federal judgment.

The distinction between post-judgment process in aid of execution and pre-judgment process initiating independent litigation was recognized in *Berry v. McLemore*, 295 F.2d 452 (5th Cir. 1986), a case virtually on all fours with the one now before us. McLemore, the Chief of Police of Maben, Mississippi, was found liable in a civil rights action for having violated Berry's constitutional rights in the course of an arrest. When McLemore failed to pay the judgment, Berry filed a "suggestion of garnishment" in the district court seeking to collect his judgment from the town. Berry alleged that the town was liable to McLemore because it had promised to pay any judgment obtained by Berry and asserted that the district court had ancillary jurisdiction to adjudicate this claim of McLemore's against the town. The Court of Appeals for the Fifth Circuit rejected Berry's argument:

> Berry [asserts] that this court has ancillary jurisdiction over the present action as necessary to enforce the judgment rendered in [Berry's favor]. . . . This post-judgment jurisdiction, however, is limited to those actions that a court may take in that same action. . . .
>
> The writ of garnishment, under the clear precedent of this court, is an action separate and independent from the action giving rise to the judgment debt. Butler, 593 F.2d 1293. Berry must have known this, as he did not file the suggestion of garnishment as a post-judgment motion to, or writ of execution to the judgment in, Berry I, but

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claims of the judgment debtor against parties who had nothing to do with the original litigation whether or not those claims were related in any way to the subject matter of the original litigation.

> rather instituted new proceedings. Moreover, the basis of the garnishment proceedings and the basis of the claim against McLemore are different. In Berry I, Berry's claim arose out of an alleged violation of his constitutional rights; in the instant garnishment proceedings, Berry's claims allegedly arise out of contract, that is the alleged oral agreement between the Town and McLemore. . . . In other words, the alleged obligations of the Town . . . are completely independent of the primary judgment against McLemore. We can find no case where a court held that it had ancillary jurisdiction to consider claims in a *new and independent action* merely because the second action sought to satisfy or give additional meaning to an earlier judgment. In any event, we are bound by our own precedent, and conclude that this court's ancillary jurisdiction to enforce its judgment does not extend to these garnishment actions. . . .
>
> Thus, since any jurisdiction that this court had in Berry I is not available to this court in the instant actions, we must find an independent basis for federal jurisdiction over these garnishment actions or else dismiss the suggestions of garnishment.

795 F.2d at 455-6.

The proposition that an independent suit to collect a federal judgment requires an independent basis of federal jurisdiction also finds support in *H. C. Cook Company v. Beecher*, 217 U.S. 497 (1910) (Holmes, J.). In *Beecher*, the plaintiff secured a money judgment against a Connecticut corporation in a patent infringement suit. It thereafter brought suit against the directors of that corporation, asserting that they were answerable for the federal judgment already obtained. The district court rejected the argument

that, because of the federal judgment, it had ancillary jurisdiction to entertain the plaintiff's claim. The Supreme Court affirmed and explained that "if the directors are under obligation by Connecticut law to pay a judgment against their corporation, that is not a matter that can be litigated between citizens of the same State in . . . [the courts] of the United States." 217 U.S. at 499.

While Justice Holmes' "pronouncement" in *Beecher* may be "delphic" as the majority suggests and while it is true that *Beecher* was decided before Rule 69 was adopted, this does not deprive it of precedential value in the current context. In *Beecher*, as in *Berry*, the court held that a federal district court does not have ancillary jurisdiction to entertain an independent action to collect a state law debt simply because that independent action is a part of an effort to collect a federal judgment. As in *Beecher* and *Berry*, the parties to this suit, in accordance with well-settled New Jersey practice, looked first to an independent action to resolve the issues concerning the collective bargaining agreement claim. It was only at the insistence of the district judge that they applied in this case for a rule to show cause why the Township should not be ordered to pay the judgment. While this application distinguishes *Beecher* and *Berry* factually, the distinction is not legally relevant. The plaintiffs cannot, by the simple expedient of filing their application in this proceeding rather than in a new one, create ancillary jurisdiction where none would otherwise exist.

I read Rule 69 as incorporating into federal practice only New Jersey's post-judgment execution process. Accordingly, for me, N. J. Stat. Ann. §§ 2A:17-61 and 62 are irrelevant. However, if Rule 69, as the majority suggests, incorporates these sections and thereby authorizes the marshal or a receiver to initiate a new proceeding against the garnishee in the

district court, the holdings of *Beecher* and *Berry* are equally pertinent here. A federal district court has no jurisdiction to entertain an independent proceeding on a state claim between non-diverse parties even if it is brought as part of an effort to collect a federal judgment.

B.

In order to understand why Rule 13(g) does not aid the plaintiffs, a more detailed review of the procedural history of the case is required. In October, 1977, there was a barroom fight between several off-duty members of the Township police department and appellees Marcos Skevofilax and Michael Michaels. This ultimately gave rise to a civil rights action which resulted in jury verdicts and substantial judgments in favor of Mr. and Mrs. Skevofilax and Michaels and against the Township and three individual police officers, Quigley, Fekete, and Semenza.

After the entry of the judgment against them, the individual police officers brought suit against the Township in the Superior Court of New Jersey, Middlesex County, seeking an order requiring it to pay the judgments entered against them. They relied upon a provision in their collective bargaining agreement with the Township that provided for indemnification by the Township of any liabilities incurred by a police officer "arising out of or incidental to the performance of his duty." The Township denied liability contending, *inter alia*, that the liability of these police officers had not arisen out of and was not incidental to the performance of their police duties.

Approximately a year after the entry of the federal judgments and while the state case remained pending, the federal plaintiffs, on the suggestion of the trial judge, moved in the district court for an order requiring the Township to pay the judgment against

the individual police officers. Their argument was predicated on the same clause of the collective bargaining agreement that was the basis for the state case brought by the police officers. The individual police officers joined in this motion and secured a stay of their state action.

In response to a rule to show cause why such an order should not be entered, the Township insisted that the district court lacked jurisdiction to adjudicate the police officers' indemnity claim.[6] It also advised the court that it denied liability on this claim not only because the officers' liability did not arise out of the performance of their duty,[7] but also because the indemnification clause, if construed to be applicable, would violate New Jersey law.

The district court, one day before cross motions for summary judgment were to have been heard in the state court, decided that it had jurisdiction to resolve the controversy between the police officers and the Township. It then held that the officers were entitled to indemnification under the collective bargaining agreement based in part on a finding "as a matter of law that they [the police officers] were operating under color of state law."[8] Purporting to act under Rule 69 of

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6. The Labor Management Relations Act, 29 U.S.C. § 141, *et seq.* and, of course, § 301 thereof, 29 U.S.C. § 185, does not provide an independent basis for federal subject matter jurisdiction. Even though a collective bargaining right is involved, the Act does not apply to political subdivisions such as the Township.

7. The Township asserts that the police officers' liability "arose not from the performance of a police officer's duty, but from the malicious excesses of a brawl."

8. The majority opinion asserts that there were no "issues of material fact concerning the construction of the indemnification clause." Typescript p. 7, and that the district judge correctly understood the Township only to be making two legal arguments.

the Federal Rules of Civil Procedure, the district court ordered the Township to pay the judgments against the police officers.

The majority's alternative rationalization for these post-judgment actions of the district court begins with the proposition that a district court exercising its ancillary jurisdiction may adjudicate Rule 13 cross-claims that assert that the claimant is entitled to be indemnified if he or she is found liable to the plaintiff. I agree that this proposition is accurate as applied to cross-claims and third-party claims that are litigated as a part of the original case. *See, e.g., Pennsylvania Railroad Co. v. Erie Avenue Warehouse Co.*, 302 F.2d 843 (3d Cir. 1962). I know of no authority, however, that would sanction an exercise of ancillary jurisdiction in the circumstances currently before us.

The majority's analysis oversimplifies the issues presented by this case. It suggests that the police officers, when they joined plaintiffs' post-judgment motion, "in effect made a Rule 13(g) cross-claim against the Township." Typescript p. 22. Had the police officers sought to pursue this course of action,

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one addressed to the court's jurisdiction and the other addressed to the public policy of New Jersey. This view of the record fails to explain the fact that there would have been no reason for the district court to have ruled at the post-judgment hearing that Quigley, Fekete, and Semenza "were operating under color of state law" unless she understood the Township and its insurer to be arguing that the conduct of their officers did not come within the terms of the collective bargaining agreement. There was no other pending issue that the district judge could have thought she was resolving by making that finding. While I believe her legal analysis was faulty when she concluded that no material issues of fact remained to be litigated, *see infra*, p. 18, clearly she understood that the Township had three arguments, not two.

they would have been required to amend their pleadings pursuant to Rule 15(a)[9] to assert such a cross-claim. Because of the policies favoring certainty in the conclusion of litigation, however, a court may not authorize amendments under Rule 15(a) after a final judgment is entered unless and until that judgment has been vacated. *Kelly v. Delaware River Joint Commission*, 187 F.2d 93, 94-95 (3d Cir.), *cert. denied* 342 U.S. 812 (1951); 3 J. Moore, *Moore's Federal Practice*, §§ 15.07[2] and 15.10 (2d Ed. 1985 Supp.); 6 C. Wright, A. Miller, & M. Kane, *Federal Practice and Procedure Civil*, § 1489 at 445 (1971 and 1985 Supp.).[10] Accordingly, the district court could not properly have granted the majority's hypothetical post-judgment motion with the final judgments still in place.

It is true that where the requirements of Rules 59(a) or 60(b) are met, a judgment may be opened and an amendment permitted. *See Kelly*; C. Wright, A.

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9. Rule 15(a) states in relevant part:

> . . . [A] party may amend his pleadings only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. . . .

10. In contrast to Rule 15(a), Rule 15(b) expressly authorizes post-judgment amendments when necessary to conform the pleadings to the issues "tried by express or implied consent of the parties." Rule 15(b) is inapplicable here because the police officers' right to be indemnified was not tried in the original proceedings. The district judge, shortly before entering the final judgments, observed in an opinion:

> [W]hether the Township may have contractual obligations to other defendants are issues between the Township and those defendants that this court has not been called upon to decide.

Miller, & M. Kane, *supra*, at § 1489.[11] However, neither provision of the Rules is applicable here. A Rule 59(a) motion must be filed within ten days of the entry of judgment and is inapplicable for that reason alone. Of the six grounds for relief from judgment specified in Rule 60(b), only the catchall sixth ground is even arguably applicable to this case and its very wording demonstrates that Rule 60(b) does not address situations like this one. To obtain relief under Rule 60(b)(6), one must show a compelling reason "justifying relief from the operation of the judgment." Here no one attacks the outstanding final judgments. They are valid and no one claims to be entitled to relief from their operation.

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11. Rule 59(a) and (b) provide:

> (a) *Grounds.* A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.
>
> (b) *Time for Motion.* A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

Rule 60(b) provides in part:

> (b) *Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.* On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake,

Moreover, even if Rule 60(b)(6) were applicable, relief is unavailable under that section absent a showing that extraordinary circumstances justify the reopening of the judgment and that the movant's delay in seeking an amendment is not unreasonable. *Federal Deposit Insurance Corp. v. Alker*, 234 F.2d 113 (3d Cir. 1956); *see McDonald v. Oliver*, 642 F.2d 169 (5th Cir. 1981); Fed. R. Civ. P. 60; C. Wright, A. Miller, & M. Kane, *supra*, § 1489 at 446-47.

The police officers made no showing of extraordinary circumstances. Nor could they have made such a showing. The officers voluntarily elected not to assert a known claim during five years of litigation, made the Township litigate that claim in New Jersey's courts for a substantial period, and did not even ask the district court to consider it until almost a year after final judgment had been rendered. While this is an extraordinary situation in the sense that it is unprecedented, it is clear that the police officers could have shown neither diligence nor extraordinary equities favoring their position.

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inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. . . .

It follows that the district court's order directing the Township to pay the judgment against the individual police officers could not stand even if it had been premised on some independent basis of subject matter jurisdiction. Because there is no such independent jurisdictional basis here, however, there is another important consideration that the majority fails to take into account. "[P]ractical needs are the basis of the doctrine of ancillary jurisdiction." *Owen Equipment*, 437 U.S at 377. Where "considerations of judicial economy, convenience, and fairness to litigants . . . are not present a federal court should hesitate to exercise jurisdiction over state claims. . . . Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law." *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 726 (1966) (footnote omitted). Where, as here, the primary litigation allegedly giving rise to the ancillary jurisdiction has been concluded before the ancillary claim is even raised, and proper resolution of the ancillary claims will require significant further proceedings in federal court, practical concerns will rarely suffice to override this interest in comity. *See id.* at 726-27.[12]

At the time the federal plaintiffs and the police officers first asserted their contract indemnity claim,

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12. This case closely resembles a number of others in which Courts of Appeal have found inappropriate an exercise of ancillary jurisdiction after the original litigation has been terminated. *See, e.g., Joiner v. Diamond M. Drilling Co.*, 677 F.2d 1035, 1043 (5th Cir. 1982) (claim against third-party defendant for contribution brought before settlement of primary claim dismissed after settlement); *McDonald v. Oliver*, 642 F.2d 169, 172 (5th Cir. 1981) (motion to apportion liability made after judgment); *Rosario v. American-Export Isbrandtsen Lines, Inc.*, 531 F.2d 1227, 1233 n. 17 (3d Cir.) (dictum, claim against third-party defendant where

the considerations of efficiency and conservation of judicial resources that would have justified an exercise of ancillary jurisdiction had that claim been timely raised were no longer applicable. Neither the plaintiffs nor the police officers have shown that there was any appropriate saving of judicial resources when the district court diverted the contract indemnity claim from the state courts.

While it is true that the district court resolved the newly-raised indemnity claim without extensive additional proceedings, the issues presented therein were not susceptible of such summary resolution. The issue of whether the officers' conduct came within the scope of the indemnity provision of the collective bargaining agreement could not appropriately be resolved by a finding that the officers were "acting under color of state law." I agree with the district judge and the plaintiffs that the original jury's verdicts necessarily determined that the individual police officers were acting "under color of state law." However, whether one so acts for the purposes of Section 1983 is determined by reference to whether one purports to act under the authority conferred by state law. *See, e.g., Monroe v. Pape*, 365 U.S. 167, 187 (1961), *overruled on other grounds, Monell v. New York City Department of Social Services*, 436 U.S. 658 (1978). That issue is therefore determined without regard to whether the civil rights defendant was performing acts which he and the State contemplated would be performed as part of his employment. *See Monroe*, 365 U.S. at 184; *Screws v. United States*, 325 U.S. 91, 111

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main claim settled before trial), *cert. denied sub nom. Rosario v. United States*, 429 U.S. 857 (1976). This case is unlike *Blackburn Truck Lines, Inc. v. Francis*, 723 F.2d 730 (9th Cir. 1984), because in *Blackburn* the court found that there was an independent basis for federal jurisdiction under the Interstate Commerce Act and 28 U.S.C. § 1337.

(1945); *Lopez v. Vanderwater*, 620 F.2d 1229 (7th Cir.), *cert. dismissed* 449 U.S. 1028 (1980). While I express no opinion with respect to the proper construction of the indemnity provision under New Jersey law, there is no reason to conclude that that provision was intended to be coterminous with Section 1983's requirement of state action.

The majority relies on equitable considerations and on presumed facts not in the record concerning the parties' insurance coverage and the conduct of the insurer in arguing that the district court should be permitted to see that its judgment is fully satisfied. However, we have no authority to disregard the interest in comity inherent in our federal system and laws of jurisdiction, or to ignore the need for finality in judgments reflected in the federal rules discussed above, simply to reach what may be a preferred result.

A True Copy:

Teste:

*Clerk of the United States Court of Appeals*
*for the Third Circuit*

**APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED MAY 7, 1986**

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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NO. 85-5300

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MARCOS SKEVOFILAX, LOUISE SKEVOFILAX, and MICHAEL MICHAELS

v.

SERGEANT WILLIAM QUIGLEY, PATROLMAN CHARLES L. FEKETE, PATROLMAN DOMINICK SEMENZA, PATROLMAN FRED GALATI, PATROLMAN ROGER BOETTINGER, PATROLMAN DONALD MERKER, PATROLMAN WILLIAM REVILL, SERGEANT LOUIS LA PLAGA, SERGEANT HAROLD THOMAS, individually, and as police officers of the Police Department of Edison Township, New Jersey, WILLIAM T. FISHER, individually and as Chief of the Police Department of Edison Township, New Jersey, TOWNSHIP OF EDISON, NEW JERSEY, THE CAPTAIN'S WHEEL, INC., and GEORGE LEONTARAKIS

Township of Edison, Appellant

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On Appeal from the United States District Court
for the District of New Jersey - Trenton
(D.C. Civil No. 79-2783)

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Argued December 6, 1985

BEFORE: ADAMS, GIBBONS and STAPLETON,
*Circuit Judges*

(Opinion filed: May 7, 1986)

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*Appendix B*

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OPINION OF THE COURT

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STAPLETON, *Circuit Judge*:

I.

In October, 1977, there was a barroom fight between several off-duty members of the Edison Township police department and appellees Marcos Skevofilax and Michael Michaels. This ultimately gave rise to a civil rights action based on 42 U.S.C. § 1983 which resulted in jury verdicts and substantial judgments in favor of Mr. and Mrs. Skevofilax and Michaels and against the Township and three individual police officers, Quigley, Fekete, and Semenza.

*Appendix B*

After the entry of the judgment against them, the individual police officers brought suit against the Township in the Superior Court of New Jersey, Middlesex County, seeking an order requiring it to pay the judgments entered against them. They relied upon a provision in their collective bargaining agreement with the Township that provided for indemnification by the Township of any liabilities incurred by a police officer "arising out of or incidental to the performance of his duty." The Township denied liability contending, *inter alia*, that the liability of these police officers had not arisen out of and was not incidental to the performance of their police duties.

Approximately a year after the entry of the federal judgments and while the state case remained pending, the federal plaintiffs moved in the district court for an order requiring the Township to pay the judgments against the individual police officers. Their argument was predicated on the same clause of the collective bargaining agreement that was the basis for the state case brought by the police officers. The individual police officers joined in this motion and secured a stay of their state action.

In response to a rule to show cause why such an order should not be entered, the Township insisted that the district court lacked jurisdiction to adjudicate the police officers' indemnity claim. It also advised the court that it denied liability on this claim not only because the officers' liability did not arise out of the performance of their duty[1] but also because the indemnification clause, if construed to be applicable, would violate New Jersey law.

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1. The Township asserts that the police officers' liability "arose not from the performance of a police officer's duty, but from the malicious excesses of a brawl."

The district court, one day before cross motions for summary judgment were to have been heard in the state court, decided that it had jurisdiction to resolve the controversy between the police officers and the Township. It then held that the officers were entitled to indemnification under the collective bargaining agreement based in part on a finding "as a matter of law that they [the police officers] were operating under color of state law." Purporting to act under Rule 69 of the Federal Rules of Civil Procedure, the district court ordered the Township to pay the judgments against the police officers. Because we conclude that the court lacked jurisdiction to enter this order, we reverse.

II.

A.

The plaintiffs-appellees do not contend that the district court had subject matter jurisdiction to grant them the relief they obtained on any basis independent of the underlying civil rights action. There is no diversity of citizenship between the Township and the police officers and their contract dispute raises no federal question. However, plaintiffs posit that, because the district court had subject matter jurisdiction over the underlying civil rights claim, it had the ancillary authority to resolve the dispute between the Township and its officers.

Federal Rule of Civil Procedure 69 provides:

> Process to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise. The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the state in which the district court is held, existing at the time the remedy is sought, except that any statute of the

United States governs to the extent that it is applicable. . . .

Fed. R. Civ. P. 69(a).

Plaintiffs read Rule 69 as authorizing a district court, in aid of its ability to enforce its own judgments, to take any action that could be taken by a court of the state in which it sits. They refer this court to certain New Jersey statutes, to wit, N.J. Stat. Ann. §§ 2A:17-59, 61, 62 and 63,[2] which they argue permit a

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2. N.J. Stat. Ann. § 2A:17-59 states:

> Rights and credits of a defendant in execution, or within his custody or control as a representative if he is sued in a representative capacity, may be levied upon, taken and sold or collected by virtue of such execution, where the judgment is entered or docketed in the superior court, a county court or a county district court.

N.J. Stat. Ann. § 2A:17-61 states:

> In lieu of a sale, the officer levying the execution may, in his own name as such officer, liquidate such rights and credits by collection, or, with the assent of the judgment creditor and subject to the provisions of this article, in any other manner.

N.J. Stat. Ann. § 2A:17-62 states:

> For the purpose of liquidation the officer levying the execution shall, at the request of the judgment creditor, sue or take proper judicial proceedings, in his own name as such officer, to obtain such recovery or relief as defendant or a receiver of defendant would be entitled to.

N.J. Stat. Ann. § 2A:17-63 states:

> After a levy upon a debt due or accruing to the judgment debtor from a third person, herein called the garnishee, the court may upon notice to the garnishee and the judgment debtor, and if the garnishee admits the debt, direct the debt, to an amount not exceeding the sum sufficient to satisfy the execution, to be paid to the officer holding the execution or to the receiver appointed by the court, either in 1 payment or in installments as the court may deem just.

New Jersey court to adjudicate any dispute between a judgment debtor and a third party so as to effect the satisfaction of a judgment rendered by that court. Plaintiffs insist that Rule 69 combined with these New Jersey statutes authorizes a federal district court sitting in New Jersey to adjudicate any dispute between a judgment debtor and a third party for the purpose of satisfying a judgment rendered by it. We disagree.

Section 2A:17-63, New Jersey's garnishment statute, applies only "if the garnishee admits the debt."[3] This statute is, accordingly, inapplicable here.

Plaintiffs' strongest argument is based on the New Jersey statutes that authorize an executing officer, in his own name, to pursue, through "proper judicial proceedings," a judgment debtor's claim against a third party. According to plaintiffs, this authority "to obtain [for the plaintiff] such recovery or relief as [the] defendant . . . would be entitled to" was sufficient to allow the district court to adjudicate the police officers' claim against the Township for plaintiffs' benefit. We fault this analysis on two grounds.

First, these New Jersey statutes do no more than authorize an executing officer to take advantage of available legal proceedings. They do not purport to create any new legal proceedings or to grant jurisdiction to litigate claims of judgment debtors against third parties. Thus, while Rule 69, to the extent it incorporates these New Jersey statutes, might arguably authorize an officer executing on a federal judgment to bring suit in a state court of general

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3. Contrary to the suggestion of the dissent, our conclusion that Rule 69 and the New Jersey statutes did not give the district court the authority to litigate the controversy between the police officers and the Township does not dictate that there be an independent basis of federal jurisdiction in order for a district court to garnish a bank account under N.J. Stat. Ann. § 2A:17-63.

jurisdiction, it cannot be read to authorize a district court to adjudicate any claim that it would not otherwise have authority to decide.

More important, Rule 69 simply cannot confer jurisdiction on district courts to resolve controversies they would not otherwise have jurisdiction to resolve. The Rules themselves, in Rule 82, expressly direct that no federal rule of civil procedure "shall ... be construed to extend or limit the jurisdiction of the United States district courts." Thus, any interpretation of Rule 69 that is consistent with Rule 82 will countenance only those state procedures which do not extend the federal court's jurisdiction. *See Owen Equipment & Erection Company v. Kroger*, 437 U.S. 365, 370 (1978); *see also Blackburn Truck Lines, Inc. v. Francis*, 723 F.2d 730, 732 (9th Cir. 1984); *Duchek v. Jacobi*, 646 F.2d 415, 417 (9th Cir. 1981) (Rule 69(a) is one of procedure, not jurisdiction); *compare Kenrose Manufacturing Co. v. Fred Whitaker Co.*, 512 F.2d 890 (4th Cir. 1972) (where jurisdiction does not otherwise appear, mere permission in the rules to assert a claim does not itself confer jurisdiction over that claim).

This principle is of crucial significance here because plaintiffs' construction of Rule 69 requires the conclusion that this rule authorizes a federal district court to adjudicate disputed claims of a federal judgment debtor against third parties whether or not those claims bear any relationship to the claim underlying the federal judgment. This would constitute a substantial expansion of federal jurisdiction. *See Owen*, 437 U.S. at 376-77 (factual similarity and logical dependence between claims is necessary for the exercise of ancillary jurisdiction); *Aldinger v. Howard*, 427 U.S. 1, 11-12 (1976) (no claim can be considered as ancillary unless it directly relates to assets actually or constructively drawn into the court's control by the principal claim);

*Ambromovage v. United Mine Workers of America*, 726 F.2d 972, 989-91 (3d Cir. 1984) (ancillary jurisdiction only extends to claims arising out of common issues of operative fact and which bear a logical relationship to the primary claim); *Danner v. Anskis*, 256 F.2d 123, 124 (3d Cir. 1958).

The ultimate issue posed by plaintiffs' reading of Rule 69 is whether the mere existence of an unsatisfied federal judgment, by itself, bestows ancillary jurisdiction on a district court to adjudicate any claim the judgment debtor may have against a third party. We believe this issue was authoritatively resolved by the Supreme Court in *H. C. Cook Co. v. Beecher*, 217 U.S. 497 (1910). In *Beecher*, the plaintiff secured a money judgment against a Connecticut corporation in a patent infringement suit. It thereafter brought suit against the directors of that corporation, asserting that they were answerable for the federal judgment already obtained. The district court rejected the argument that, because of the federal judgment, it had ancillary jurisdiction to entertain the plaintiff's claim. The Supreme Court affirmed and explained that "if the directors are under obligation by Connecticut law to pay a judgment against their corporation, that is not a matter that can be litigated between citizens of the same State in . . . [the courts] of the United States." 217 U.S. at 499.

We find this case virtually on all fours with the *Beecher* case. Congress has allowed federal courts discretion to exercise ancillary jurisdiction to satisfy practical interests in "protect[ing] legal rights [and] effectively . . . resolv[ing] an entire, logically entwined law suit." *Owen Equipment*, 437 U.S. at 377. As in *Beecher*, neither justification for the exercise of ancillary jurisdiction is present in this case. There is no contention that a federal judgment was in jeopardy and that the district court was required to act to

protect it. Nor is there any suggestion that the police officers or the plaintiffs needed the federal forum in order to protect their interests. Not only were the state courts available to both groups, but a state action had been instituted, and indeed is still pending, in which the issue they wished resolved was present for resolution.

B.

The dissent has constructed an alternative justification for the district court's order. Its analysis begins with the proposition that a district court exercising its ancillary jurisdiction may adjudicate Rule 13 cross-claims and Rule 14 third-party claims that assert that the claimant is entitled to be indemnified if he or she is found liable to the plaintiff. We agree that this proposition is accurate as applied to cross-claims and third-party claims which are litigated as a part of the original case. *See, e.g., Pennsylvania Railroad Co. v. Erie Avenue Warehouse Co.*, 302 F.2d 843 (3d Cir. 1962). We know of no authority, however, which would sanction an exercise of ancillary jurisdiction in the circumstances currently before us.

The dissent's analysis oversimplifies the issues presented by this case. It suggests that the police officers, when they joined plaintiffs' post-judgment motion, "in effect made a Rule 13(g) cross-claim against the Township." Had the police officers sought to pursue this course of action, they would have been required to amend their pleadings pursuant to Rule 15(a)[4] to assert such a cross-claim. Because of the policies favoring certainty in the conclusion of

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4. Rule 15(a) states in relevant part:

> . . . [A] party may amend his pleadings only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. . . .

litigation, however, a court may not authorize amendments under Rule 15(a) after a final judgment is entered unless and until that judgment has been vacated. *Kelly v. Delaware River Joint Commission*, 187 F.2d 93, 94-95 (3d Cir.), *cert. denied* 342 U.S. 812 (1951); 3 J. Moore, *Moore's Federal Practice* §§ 15.07[2] and 15.10 (2d Ed. 1985 Supp.); 6 C. Wright, A. Miller, & M. Kane, *Federal Practice and Procedure*, § 1489 at 445 (1971 and 1985 Supp.).[5] Accordingly, the district court could not properly have granted the dissent's hypothetical post-judgment motion with the final judgments still in place.

It is true that where the requirements of Rules 59(a) or 60(b) are met, a judgment may be opened and an amendment permitted. *See Kelly*; Wright & Miller, *supra*, at § 1489.[6] However, neither provision of the Rules is applicable here. A Rule 59(a) motion must be

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5. In contrast to Rule 15(a), Rule 15(b) expressly authorizes post-judgment amendments when necessary to conform the pleadings to the issues "tried by express or implied consent of the parties." Rule 15(b) is inapplicable here because the police officers' right to be indemnified was not tried in the original proceedings. The district judge, shortly before entering the final judgments, observed in an opinion:

> [W]hether the Township may have contractual obligations to other defendants are issues between the Township and those defendants that this court has not been called upon to decide.

6. Rule 59(a) and (b) provide:

> (a) *Grounds*. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may

filed within ten days of the entry of judgment and is inapplicable for that reason alone. Of the six grounds

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open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

(b) *Time for Motion.* A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

Rule 60(b) provides:

(b) *Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.* On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

for relief from judgment specified in Rule 60(b), only the catchall sixth ground is even arguably applicable to this case and its very wording demonstrates that Rule 60(b) does not address situations like this one. To obtain relief under Rule 60(b)(6), one must show a compelling reason "justifying relief from the operation of the judgment." Here no one attacks the outstanding final judgments. They are valid and no one claims to be entitled to relief from their operation.

Moreover, even if Rule 60(b)(6) were applicable, relief is unavailable under that section absent a showing that extraordinary circumstances justify the reopening of the judgment and that the movant's delay in seeking an amendment is not unreasonable. *Federal Deposit Insurance Corp. v. Alker*, 234 F.2d 113 (3d Cir. 1956); *see McDonald v. Oliver*, 642 F.2d 169 (5th Cir. 1981); Fed. R. Civ. P. 60; Wright & Miller, *supra*, § 1489 at 446-47. The police officers made no showing of extraordinary circumstances. Nor could they have made such a showing. The officers voluntarily elected not to assert a known claim during five years of litigation, made the Township litigate that claim in New Jersey's courts for a substantial period, and did not even ask the district court to consider it until almost a year after final judgment had been rendered. While this is an extraordinary situation in one sense, we believe the police officers could have shown neither diligence nor extraordinary equities favoring their position.

It follows that the district court's order directing the Township to pay the judgment against the individual police officer could not stand even if it had been premised on some independent basis of subject matter jurisdiction. Because there is no such independent jurisdictional basis here, however, there is another important consideration which the dissent fails to take into account. "[P]ractical needs are the

basis of the doctrine of ancillary jurisdiction." *Owen Equipment*, 437 U.S. at 377. Where "considerations of judicial economy, convenience, and fairness to litigants ... are not present a federal court should hesitate to exercise jurisdiction over state claims.... Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law." *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 726 (1966) (footnote omitted). Where, as here, the primary litigation allegedly giving rise to the ancillary jurisdiction has been concluded before the ancillary claim is even raised, and proper resolution of the ancillary claims will require significant further proceedings in federal court, practical concerns will rarely suffice to override this interest in comity. *See id.* at 726-27. As the Supreme Court indicated in *Beecher*, the mere presence of an uncollected federal judgment does not justify an exercise of ancillary jurisdiction in such circumstances.[7]

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7. This case also closely resembles a number of others in which Courts of Appeal have found inappropriate an exercise of ancillary jurisdiction after the original litigation has been terminated. *See, e.g., Joiner v. Diamond M. Drilling Co.*, 677 F.2d 1035, 1043 (5th Cir. 1982) (claim against third-party defendant for contribution brought before settlement of primary claim); *McDonald v. Oliver*, 642 F.2d 169, 172 (5th Cir. 1981) (motion to apportion liability made after judgment); *Rosario v. American-Export Isbrandtsen Lines, Inc.*, 531 F.2d 1227, 1233 n.17 (3d Cir.), *cert. denied sub nom. Rosario v. United States*, 429 U.S. 857 (1976) (dictum, claim against third-party defendant where main claim settled before trial). This case is unlike *Blackburn Truck Lines, Inc. v. Francis*, 723 F.2d 730 (9th Cir. 1984), because in *Blackburn* the court found that there was an independent basis for federal jurisdiction under the Interstate Commerce Act and 28 U.S.C. § 1337. Moreover, to the extent that *Blackburn* conflicts with *Beecher*, we decline to follow it.

*Appendix B*

At the time the police officers first asserted their contract indemnity claim, the considerations of efficiency and conserva- tion of judicial resources that would have justified an exercise of ancillary jurisdiction had that claim been timely raised were no longer applicable. Neither the plaintiffs nor the police officers have shown that there was any appropriate saving of judicial resources when the district court diverted the contract indemnity claim from the state courts.

While it is true that the district court resolved the newly-raised indemnity claim without additional proceedings, the issues presented therein were not susceptible of such summary resolution. The issue of whether the Township had a duty to indemnify could not appropriately be resolved by a finding that the officers were "acting under color of state law." We agree with the district judge and the plaintiffs that the original jury's verdicts necessarily determined that the individual police officers were acting "under color of state law." However, whether one so acts for the purposes of Section 1983 is determined by reference to whether one purports to act under the authority conferred by state law. *See, e.g., Monroe v. Pape*, 365 U.S. 167, 187 (1961), *overruled on other grounds, Monell v. New York City Department of Social Services*, 436 U.S. 658 (1978). That issue is therefore determined without regard to whether the civil rights defendant was performing acts which he and the State contemplated would be performed as a part of his employment. *See Monroe*, 365 U.S. at 134; *Screws v. United States*, 325 U.S. 91, 111 (1945); *Lopez v. Vanderwater*, 620 F.2d 1229 (7th Cir.), *cert. dismissed* 449 U.S. 1028 (1980). While we express no opinion with respect to the proper construction of the indemnity provision under New Jersey law, there is no reason to conclude that that provision was intended to

be coterminous with Section 1983's requirement of state action.

The dissent relies on equitable considerations, as well as on presumed facts not in the record concerning the parties' insurance coverage in arguing that the district court should be permitted to see that its judgment is fully satisfied. However, we have no authority to disregard the interest in comity inherent in our federal system and laws of jurisdiction, or to ignore the need for finality in judgments reflected in the federal rules discussed above, simply to reach a preferred result. In any event, the dissent does not demonstrate that the federal plaintiffs will be unable to satisfy their judgment in state court proceedings instituted for that purpose.

III.

The plaintiffs' motion for a post-judgment order directing the Township to indemnify its police officers brought before the district court for the first time a state law claim over which it had no independent basis of jurisdiction. At that point, the district court lacked ancillary jurisdiction to entertain that claim and its order granting the requested relief cannot stand. Accordingly, the court's order of April 25, 1985 is reversed insofar as it orders the Township to pay the judgments against defendants Quigley, Fekete, and Semenza.

*Appendix B*

GIBBONS, *Circuit Judge*, dissenting:

A judicial system that is impotent to enforce its own judgments effectively is as useless to the society it purports to serve as a gelding would be to the owner of a brood mare. The labored effort of the majority to construct an elaborate "jurisdictional" theory so as to deprive federal courts of the capacity to enforce their money judgments by garnishment of third party debts owed to judgment debtors is fundamentally unsound. The proposition that any court must have an independent source of subject matter jurisdiction in order to enforce claims owed to judgment debtors is inconsistent with any rational approach to judicial administration. Endorsing the conduct of the compensated liability insurance carrier that defended this case by reversing the district court is an open invitation to similar conduct by other carriers. The majority opinion will, I am confident, be deplored by district judges who in so many cases must deal with indemnitors that control prejudgment litigation by virtue of their convenants to defend. It is bad ancillary jurisdiction law and worse policy.

I.

The Township of Edison, New Jersey appeals from a district court's post-judgment order directing the township to pay a judgment entered in favor of Marcos and Louise Skevofilax and Michael Michaels against three co-defendant police officers employed by the township. The Skevofilaxes and Michaels obtained separate damage awards in the district court against both the individual police officers and the township.[1]

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1. In the underlying proceeding the plaintiffs alleged that the defendant officers and the township had violated their constitutional rights and sought damages under 42 U.S.C. § 1983 (1982). The district court thus had subject matter jurisdiction. *See* 28 U.S.C. § 1331 (1982). The plaintiffs also pleaded pendent state law

Those awards are not challenged. At the time of the events giving rise to the lawsuit, the township employed the police officers under the terms of a collective bargaining agreement that provided that the township would provide "the necessary means for the defense" in any action arising out of or incidental to the performance of their duty. The collective bargaining agreement also provided that

> [i]n the event of a judgment against a member of the bargaining unit arising out of or incidental to the performance of his duty, the employer agrees to pay for said judgment or arrange for the payment of said judgment.

We are called upon to decide whether, in light of this provision, the district court properly ordered the township to satisfy the judgments rendered against the individual defendant police officers.

II.

It is undisputed that the township contracted for liability insurance, and at the heart of this appeal lies a disagreement amongst the insurance carrier, the township, and the individual police officers. After the district court entered judgment in favor of the plaintiffs, the carrier refused to pay either the $74,964.14 award against the township or the awards

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claims against the township for negligence and against the police officers for malicious prosecution. A seven-week trial produced a judgment in favor of appellee Skevofilax against the township for $74,964.14 for its negligence and against the police officers individually for $296,700.19 for their violation of his constitutional rights and $55,236.75 for malicious prosecution. Appellee Michaels obtained a judgment against the police officers individually for $22,000 for their violation of his constitutional rights and $1,000 for malicious prosecution. The district court, acting pursuant to 42 U.S.C. § 1988 (1982), also awarded a judgment for attorneys fees against the police offices individually in the sum of $199,521.00.

totaling $573,484.94 against the police officers. The carrier apparently took the position that, because the conduct of the police officers violated the criminal law of New Jersey, any indemnification agreement, embodied either in a collective bargaining agreement or in an insurance contract, was void as a violation of New Jersey public policy. Although that ground for resisting payment had no relevance to the judgment against the township for negligence, the carrier nevertheless refused to pay the judgment against the township unless it first obtained from the officers a release of any right to indemnification they had under the collective bargaining agreement.

Since no payment was forthcoming, the plaintiffs, acting pursuant to Rule 69 of the Federal Rules of Civil Procedure, caused a writ of execution to be levied by the United States Marshal upon the township's assets, specifically its bank account. At the same time and acting pursuant to the same rule, they commenced garnishment proceedings upon the salaries of the police officers. In conjunction with these latter proceedings the district court held a hearing on April 15, 1985, at which time the plaintiffs notified the court that the police officers had commenced in the New Jersey Superior Court an action against the township to compel it to honor the indemnity undertaking contained in the collective bargaining agreement. They also notified the district court that the judgment against the township remained unpaid.

At the district court's suggestion the plaintiffs subsequently obtained and served upon the township an order directing it to show cause why it should not pay the judgments rendered against the individual police officers. In response to this maneuver the police officers obtained a stay of the state proceedings and joined the plaintiffs' motion. In support of that motion the officers supplied to the district court and to counsel

for the township copies of the brief they had filed in the New Jersey court in support of their motion for summary judgment on their claim for contract indemnification.

On the return date of the order to show cause the township appeared, represented by two attorneys. One, Peter DeSarno, was the regular township attorney, and the other, Martin McGowan, was a member of the firm that the insurance carrier had retained on behalf of the defendants. The police officers had their own counsel. Neither DeSarno nor McGowan filed papers in opposition to the relief sought by the plaintiffs, nor did they request additional time to do so. Neither suggested that the district court should abstain from deciding any legal issue that might have been resolved in the then-pending state court action. Both addressed the merits of the motion.

The township argued that the district court did not have jurisdiction to order the township to pay the judgments rendered against the individual defendants. Alternatively, it contended that the indemnity agreement in the collective bargaining agreement was void under New Jersey law. It did not claim that there were any issues of material fact concerning the construction of the indemnification clause. The township also contended that the district court could not grant the motion because the parties had not litigated the township's indemnity obligation during the trial. Responding to that argument, the court observed quite accurately, "Why should it have been an issue in the trial? Who is going to pay an obligation that nobody doubted the Township of Edison was going to pay, or its carrier?" Joint Appendix at 103. What the court obviously meant was that, since the carrier was in charge of the trial defense and had not notified the defendants that it would contest its indemnification liability, there was no occasion for the

police officers to file a cross-claim against the township. *See infra* Part III. B.

The district court rejected the township's arguments and ordered it to do the following:

> a) To pay and satisfy the portion of said judgment entered against the individual police officers in favor of plaintiff Marcos Skevofilax for compensatory damages, as reduced by the remittitur in the sum of $296,700.19;
>
> b) To pay and satisfy the portion of said judgment entered against the individual police officers in favor of Marcos Skevofilax in the amount of $55,236.75, being the judgment for compensatory damages as reduced by the remittitur entered by reason of malicious prosecution;
>
> c) To pay and satisfy the portion of the said judgment entered against the Township of Edison in favor of Marcos Skevofilax in the amount of $74,964.14, for compensatory damages for the negligence of said Township[;]
>
> d) To pay and satisfy the portion of said judgment entered against the individual police officers in favor of Michael Michaels in the amount of $11,000.00 for compensatory damages for the negligence of said Township[;]
>
> e) To pay and satisfy the portion of said judgment entered against the individual police officers in favor of Michael Michaels in the amount of $1,000.00 being the judgment for compensatory damages for malicious prosecution[;]
>
> f) To pay the plaintiff the sum of $3,048.70 which is the amount entered by the Clerk of the Court for costs in this action;

g) To pay all above stated sums with interest at the rate of 11.74% from May 31, 1984, being the date of entry of judgment, to the present[;]

h) To pay to the plaintiffs the sum of $199,521.00, being the amount of attorneys fees awarded by this Court[;]

i) To pay to the plaintiffs the sum of $5,706.45, being the amount of disbursements previously awarded by this Court[;]

j) To pay the sums listed in h and i hereof, with interest at the rate of 11.74% from November 28, 1984[;]

k) To pay to plaintiff's [sic] additional attorneys fees and disbursements in the amount of $3,763.00.

*Skevofilax v. Quigley*, Civ. Action No. 79-2783 (D.N.J. Apr. 25, 1985) (order).

III.

The township objects to that portion of the order requiring it to pay the judgments rendered against the individual officers.[2] It advances the same arguments that it proffered to the district court – that the district court lacked jurisdiction to enter the order and that, even if the court had the requisite jurisdiction, it erred in holding that the indemnity provision in the collective bargaining agreement was enforceable with respect to the instant judgment.

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2. After the notice of appeal was filed the insurance carrier acknowledged its obligation to pay the $74,964.14 negligence judgment against the township. The township then paid that amount, but did so only after the district court entered an order directing the First National State Bank of Edison to turn over to the United States Marshal funds in the township's bank account.

*Appendix B*

A.

The township's jurisdictional argument starts with the preamble to the district court order, which expressly referred to Rules 69 and 70 of the Federal Rules of Civil Procedure. That reference, the township urges, confines the "jurisdictional" dispute to an inquiry into the district court's authority to issue orders in aid of enforcement of its judgment.

The appellees respond that even if one looks only at the court's authority to enforce its judgment that authority is broad enough to sustain the district court order. They point out that Rule 69 cross-references to "proceedings supplementary to and in aid of judgments" of the state in which the district court is held. In light of this language and New Jersey law, they contend, Rule 69 authorizes a district court to order a debtor of a judgment debtor to pay a judgment rendered against the judgment debtor.

The New Jersey statutory scheme for the enforcement of a judgment against rights and credits of a judgment debtor is clear:

> Rights and credits of a defendant in execution . . . may be levied upon, taken and sold or collected by virtue of such execution . . . .

N.J. Stat. Ann. § 2A:17-59 (West 1952)

> In lieu of a sale, the officer levying the execution may, in his own name as such officer, liquidate such rights and credits by collection, or, with the assent of the judgment creditor and subject to the provisions of this article, in any other manner.

N.J. Stat. Ann. § 2A:17-61 (West 1952).

> For the purpose of liquidation the officer levying the execution shall, at the request of

> the judgment creditor, sue or take proper judicial proceedings, in his own name as such officer, to obtain such recovery or relief as defendant or a receiver of defendant would be entitled to.

N.J. Stat. Ann. § 2A:17-62 (West 1952). This last-quoted provision authorizes the adjudication of a dispute between a judgment debtor and a third party so as to assure the satisfaction of a judgment. *See Barrett Co. v. United Building & Construction Co.*, 5 N.J. Misc. 87, 88, 135 A. 477, 478 (1926); *Sebring v. Pratt*, 91 N.J.L. 393, 393-94, 103 A. 999, 999 (1918); *Johnson v. Lyons*, 103 N.J. Eq. 315, 318, 143 A. 373, 374 (Ch. 1928).

The majority reasons that the liquidation procedure prescribed by section 2A:17-67 may not be utilized for the enforcement of a federal court judgment because that statutory provision cannot enlarge federal court jurisdiction. Obviously, however, neither the liquidation provision in section 2A:17-62, nor the more summary remedy in section 2A:17-59, nor any other New Jersey statute has anything at all to do with federal court jurisdiction. Those statutes, however, constitute "[t]he practice and procedure [of execution] of the state in which the district court is held." Fed. R. Civ. P. 69(a). By virtue of Rule 69 the same relief is available in federal court for the satisfaction of a federal court judgment as would be available in a state court. Rule 69 does not contemplate that the holders of federal judgments must resort to state tribunals for their enforcement.[3] *Green v. Benson*, 271 F. Supp. 90,

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3. The township contends that, because it disputes its liability under the collective bargaining agreement, there is no method under New Jersey law to enforce against it the judgment against the police officers. In making that assertion it relies on National Cash Register Co. v. 6016 Bergenline Ave. Corp., 140 N.J. Super. 454, 457, 356 A.2d 447 (App. Div. 1976) (per curiam). That case,

93 (E.D. Pa. 1967) (holding that district court had ancillary jurisdiction to adjudicate garnishment action by a judgment creditor against the nonparty insurer of a judgment debtor).

The majority's holding, it should be noted, is equally applicable to the district court's effort to garnish the township's bank account. The bank is in the same debtor relationship to the township as is the township to the individual police officers. Thus, although in this case the township paid the judgment rendered against it after the garnishment of its bank account, in the future, under the majority's holding, such a garnishment will not be possible in the absence of a separate basis of federal subject matter jurisdiction over the garnishee bank. Even the fact that the garnishee may not dispute the debt will not be dispositive, for the summary remedy specified in section 2A:17-59 and the liquidation remedies specified in section 2A:17-60 are equally subject to the majority's requirement of a separate basis of federal subject matter jurisdiction over the garnishee. Since such a separate basis of subject matter jurisdiction will rarely exist, the effect of the majority's position is that in almost all cases federal courts will be unable to enforce their judgments by resort to garnishment process.

Unfortunately, the untoward consequences of the majority's insistence upon a federal district court possessing an independent basis of subject matter jurisdiction over a garnishee will not be confined to efforts at post-judgment enforcement. Under Rule 64 of the Federal Rules of Civil Procedure prejudgment in rem and quasi in rem remedies are available "under the

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however, concerns the summary turnover procedure authorized by N.J. Stat. Ann. § 2A:17-63 (West 1952). It does not address the question whether a claim against a debtor of the judgment debtor can be reached by virtue of the liquidation provision in N.J. Stat. Ann. § 2A:17-62 (West 1952). The majority does not rely on the township's argument based on the *National Cash Register* case.

circumstances and in the manner provided by the law of the state in which the district court is held." The majority's approach means that such remedies will be available only in one instance: a case in which there is complete diversity between the plaintiff and both the defendant and the garnishee. Garnishment or any similar provisional prejudgment remedy can never be available in a federal question case, for there will be no federal question claim against the party subject to the prejudgment seizure, but only against the defendant. Yet Rule 64 provides explicitly for prejudgment garnishment and obviously contemplates its availability in diversity cases as well as in federal question cases. The majority rule makes this remedy unavailable in the latter class of cases. No interests of the United States, or of the states in the federal union suggest such a patently ridiculous rule. The majority's reference to interests of comity is totally unpersuasive in the absence of some reference to an interest of the State of New Jersey which would be offended by permitting a federal court to take the steps required to enforce its judgments. A rule requiring that there be a separate state lawsuit to enforce a federal court judgment by garnishment process actually impairs any identifiable interest of that state. It imposes on the state courts the role of serving as an ancillary or adjunct to the district court by cleaning up the loose ends of a district court lawsuit.

The majority finds support for its vasectomy of the district court's judgment enforcement powers in *H.C. Cook Company v. Beecher*, 217 U.S. 497 (1910). That opinion, by Justice Holmes, is a typically delphic pronouncement. It states the result described by the majority, but not the reasons for that result. Justice Holmes probably intended the opinion to be an interpretation of the then-governing statute, the Conformity Act of 1872, ch. 255, 17 Stat. 196. If it was so intended, *Beecher* is wholly irrelevant to the issue of

ancillary jurisdiction exercised pursuant to Rule 69, a rule that was not drafted until after enactment in 1934 of the Rules Enabling Act, Pub. L. No. 416, 48 Stat. 1064 (codified at 28 U.S.C. § 2072 (1982)). If, on the other hand, Justice Holmes intended his opinion to serve as a pronouncement on the constitutional limits of ancillary jurisdiction, he certainly kept that intention to himself, for it is nowhere mentioned in the opinion. Thus, beyond its superficial factual similarity, *Beecher* bears no resemblance to this case before us and lends no support to the majority's position.

B.

Entirely apart from the court's authority under Rule 69 and New Jersey law, however, there is in this case a separate basis for subject matter jurisdiction over the dispute with respect to the township's obligation to indemnify the police officers. Had the carrier in the prejudgment stage asserted on behalf of the township that it would not honor the contractual indemnity agreement in the collective bargaining agreement, it would have been appropriate for the police officers to file a cross-claim against the township for contract indemnification pursuant to Rule 13(g). *See, e.g., Thomas v. Malco Refineries, Inc.*, 214 F.2d 884, 886 (10th Cir. 1954); *President & Directors of Georgetown College v. Madden*, 505 F. Supp. 557, 593-95 (D. Md. 1980), *aff'd in part and dismissed in part*, 660 F.2d 91 (4th Cir. 1981); *Coyne v. Marquette Cement Manufacturing Co.*, 254 F. Supp. 380, 388 (W.D. Pa. 1966); 6 C. Wright and A. Miller, Federal Practice and Procedure § 1431, at 169 (1971).[4]

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4. Furthermore, the township could have moved pursuant to Rule 14(a) to join the carrier as a third party. *See, e.g.*, Government Employees Ins. Co. v. United States, 400 F.2d 172, 174 (10th Cir. 1968); Southern Farm Bureau Casualty Ins. Co. v. United States,

There is no time limit on the filing of such a cross-claim, and a district court may separate its adjudication from the main trial. *See* Fed. R. Civ. P. 42(b).

When the police officers joined in the plaintiffs' motion, they in effect made a Rule 13(g) cross-claim against the township even though they did not formally so designate their claim. The fact that the officers filed their cross-claim after the adjudication of the main claim does not in these circumstances eliminate the district court's ancillary jurisdiction to consider it. *Blackburn Truck Lines, Inc. v. Francis*, 723 F.2d 730, 732 (9th Cir. 1984).[5] Nor does the existence of the additional procedural requirements for the post-judgment amendment of pleadings alluded to by the majority preclude the exercise of such jurisdiction, for the those procedural difficulties do not bear upon the district court's subject matter jurisdiction and thus lend no support to the majority's deficient analysis of the scope of ancillary jurisdiction.

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395 F.2d 176, 179-80 (8th Cir. 1968); Impex Agricultural Commodities Div. Impex Overseas Corp. v. Parness Trucking Corp., 576 F. Supp. 587, 591 n.2 (D.N.J. 1983). Impleading would have been proper even if the carrier had been conducting the defense, so long as the carrier contested its indemnification liability. Rosalis v. Universal Distributors, Inc., 21 F.R.D. 169, 172 (D. Conn. 1957); 6 C. Wright and A. Miller, Federal Practice and Procedure § 1449, at 267 (1971).

5. The conclusion that the district court had ancillary subject matter jurisdiction over this cross-claim draws additional support from Barrow v. Hunton, 99 U.S. 80 (1878), in which the Supreme Court held that a judgment debtor's attack on a judgment rendered by a state court could not be removed to federal court because such an attack was ancillary to the original state proceeding. *See id.* at 83-85. Neither a state court nor a federal court must depend upon the other for the enforcement of a judgment.

C.

Any defect in the proceedings resulting in the order appealed from was at most procedural, not jurisdictional. Whether one approaches the matter as a Rule 69(a) proceeding or as a Rule 13(g) proceeding, the township was entitled to a procedure appropriate to the nature of the dispute, which was limited to the issue of the legality under New Jersey law of the township's indemnity undertaking. There were no disputed issues of material fact, and the township never urged that it required a more adequate opportunity to marshall its legal arguments. Indeed the township's legal position was presented to the district court in substantially the same manner as it is presented on appeal. Thus any procedural irregularities resulting from the summary manner in which the district court resolved the dispute over the township's indemnification undertaking must be regarded as harmless. "At every stage of the proceeding [we] must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties." Fed. R. Civ. P. 61.

The majority attempts to bolster is conclusion by relying on procedural technicalities:

> These defendants voluntarily elected not to assert a known claim during five years of litigation, made the Township litigate that claim in New Jersey's courts for a substantial period, and did not even ask the district court to consider it until almost a year after final judgment had been rendered.

Typescript at 13. This effort is preposterous because it addresses alleged misconduct by the defendants as a ground for deciding an ancillary jurisdiction issue against the *plaintiffs*. Until the plaintiffs had a judgment there was no claim they could have asserted

against putative garnishees. Moreover, the argument is absurd even from the defendants' perspective, for it ignores totally the conduct of the insurance carrier, which defended the action on behalf of all defendants until after a judgment was rendered without ever asserting the claim that the indemnity undertaking for which it accepted a premium was void. Since both the individual defendants and the township plainly expected the carrier to pay the resulting judgment, there was no reason for the individual defendants to assert a cross-claim for the enforcement of the township's separate indemnity undertaking until the carrier made known its intention not to pay *any* judgment. The delay of a year on which the majority relies resulted solely from the recalcitrance of the carrier, and the claim for indemnity was asserted shortly after the individuals were subjected to a wage execution.

D.

Since I have no doubt that the district court had ancillary jurisdiction, I address the merits of the township's objection to the district court's disposition of the dispute over the indemnification agreement. The sole substantive defense that the township offers is that the collective bargaining agreement, if construed to mean what it unequivocally says, would be illegal under New Jersey law. That position is without merit.

The New Jersey courts have expressly held enforceable a municipality's obligation, contained in a collective bargaining agreement, to indemnify city officers for compensatory damage awards arising out of unlawful acts. *See City Council v. Fumero*, 143 N.J. Super. 275, 362 A.2d 1279 (Law Div. 1976). At issue in *Fumero* was a municipality's obligation under a collective bargaining agreement – indistinguishable for purposes of this appeal from the one between the

Township of Edison and its police officers -- to defend and indemnify municipal officers who were defendants in a section 1983 suit. The municipality had sought a declaratory judgment against its insurance carrier and the defendant officers after the carrier had refused to defend the officers. With respect to the enforceability of the collective bargaining agreement's indemnification provision, the New Jersey court wrote,

> The collective bargaining agreement also addressed itself to the issue of indemnification for judgments which might be recovered against members of the bargaining unit. Counsel have not referred to any statutory provision which addresses itself to this issue. In the absence of a controlling statute, the terms of the contract control the rights of the respective parties. The agreement presently before the court requires the municipality to indemnify the individual officers for a judgment of compensatory damages. No right of indemnity exists if a judgment for punitive damages is returned. Such a contractual provision is in accord with public policy.

*Id.* at 284, 362 A.2d at 1283-84 (citations omitted). The court also held that the insurance carrier was obliged under its policy to defend and indemnify the police officers. *Id.* at 288; 362 A.2d at 1285.[6]

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6. That *Fumero* is undoubtedly still a correct statement of New Jersey law with respect to contract indemnification is evidenced by the recent New Jersey Supreme Court decision in Moya v. City of New Brunswick, 90 N.J. 491, 448 A.2d 999 (1982), in which that court made clear that a collective bargaining agreement may afford the type indemnification that the township contests here. *See id.* at 505 n.8, 448 A.2d at 1006 n.8.

*Appendix B*

Relying on *Moya v. City of New Brunswick*, 90 N.J. 491, 448 A.2d 999 (1982), and *Valerius v. City of Newark*, 84 N.J. 591, 423 A.2d 988 (1980), the township contends that the indemnification clause is contrary to New Jersey public policy and is therefore unenforceable. The authorities cited by the township have no bearing upon this appeal. They deal with the entirely distinct matter of the *statutory* obligation to defend and indemnify imposed upon municipalities and other government agencies by the New Jersey Tort Claims Act. *See Moya*, 90 N.J. at 495, 448 A.2d at 1001; *Valerius*, 84 N.J. at 593, 423 A.2d at 989. The statutory liability at issue in *Moya* and *Valerius* has nothing to do with the legality of a contract indemnification undertaking.

*Fumero* is dispositive of the issue of the enforceability of the indemnification clause at issue in this case. Thus I would reject the township's contention that the district court erred as a matter of law in holding that the indemnification clause required the township to satisfy the judgments rendered against the individual police officers.

IV.

The majority's holding that a district court must have a separate basis of subject matter jurisdiction before it can enforce a judgment by garnishment process is bad law and worse judicial administration. The district court had authority under both Rule 69(a) and Rule 13(g) to decide the issue of the township's duty to indemnify the individual defendant police officers. The district court's holding that the township owed such a duty and that the judgment creditors of the defendant police officers could reach the township is consistent with New Jersey law. The order appealed from should, therefore, be affirmed. I dissent.

*Appendix B*

**A True Copy:**

**Teste:**

***Clerk of the United States Court of Appeals***
***for the Third Circuit***

## APPENDIX C — HEARING HELD APRIL 25, 1985 IN UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CIVIL NO. 79-2783

MARCOS SKEVOFILAX, et al.,

Plaintiffs,

v.

WILLIAM QUIGLEY, et al.,

Defendants.

HEARING
April 25, 1985
Trenton, New Jersey

B E F O R E:

THE HONORABLE MARYANNE TRUMP BARRY, U.S.D.J.

A P P E A R A N C E S:

RAFAEL ABROMOWITZ, ESQ., and
CAROL MELLOR, ESQ.
For the Plaintiffs.

*Appendix C*

PETER DE SARNO, ESQ.,
For the Township of Edison.

BERNARD BOGLIOLI, ESQ.,
BY: MARTIN MC GOWAN, ESQ.,
For the Township of Edison.

[2] THE COURT: Mr. Abromowitz, have you resolved your status with Mr. Skevofilax?

MR. ABROMOWITZ: Yes, your Honor. As far as I understand it, I had a communique from the attorney, Herbert New, yesterday, and he indicated to me that he was not interested in pursuing the case or he wasn't sure that he was going to be paid, and I took him at his word. I have no communique.

THE COURT: He has to be paid by the township of Edison also?

MR. ABROMOWITZ: No, he expected to be paid by us, but I suppose we could lay it off at the township at some point.

THE COURT: All right.

MR. ABROMOWITZ: That is the latent communique. We have a volatile client and I don't know what the status is. By the way, our client, in his communiques to other attorneys in the case, has never mentioned the existence of Herbert New. I was the only one privy to that.

*Appendix C*

THE COURT: I don't know of Herbert New, either. Who do I have before me? You are?

MR. SOOS: Charles Soos from George F. Hendricks' office. We have joined in the motion.

THE COURT: I know Mr. DeSarno and Mr. McGowan.

MR. DE SARNO: I received the motion this morning, it [3] looks like a duplicate of what was filed in the state court in any event.

THE COURT: You received what motion, Mr. DeSarno?

MR. DE SARNO: From Mr. Soos.

THE COURT: From Mr. Soos? What about Mr. Abromowitz's motion?

MR. DE SARNO: I have an order to show cause from him.

THE COURT: What is your response to the order to show cause?

MR. DE SARNO: I am not here to argue about the first point.

THE COURT: First, let me ask you a question. Who represents the Township of Edison before me? At trial, it was Mr. Boglioli.

MR. DE SARNO: Correct.

THE COURT: I gather now it is you, although at trial you represented Chief Fisher.

MR. DE SARNO: As you remember, I motioned out at the end of the case.

THE COURT: Pardon me?

MR. DE SARNO: I never went to the jury on behalf of the Township—

THE COURT: I am not talking about that. For purposes of trial, Mr. Boglioli represented and Mr. [4] McGowan represented the Township of Edison, and you represented the chief, yes?

MR. DE SARNO: Initially I represented the township, too, on punitive claims which were let out when it came before your Honor, that is true. I was there both for the town and for Chief Fisher, for some parts of the punitive aspect, or direct aspects. Don't ask me how. I motioned out at the end of the entire case and your Honor granted that motion. It only went to the jury on the vicarious liability of the township vis-a-vis the police officers.

THE COURT: I remember what happened at the trial. Who do you represent today?

MR. DE SARNO: I am here on the second so-called jurisdictional issue.

*Appendix C*

THE COURT: Do you represent the Township of Edison, DeSarno, or don't you?

MR. DE SARNO: Only the second count.

THE COURT: I am talking about Mr. Abromowitz's order to show cause.

MR. DE SARNO: Let me say this to you. Mr. Boglioli said to me, and I believe him, because I was able to confirm it with a three way conversation, there is an attorney called Aberstater in New Jersey. I wish he were here, because he is the New Jersey attorney. Way, way back, Mr. Boglioli wanted [5] from them a simple warrant to satisfy judgment. They would not give him a simple warrant. He has been ready, willing and able to pay.

THE COURT: To pay what?

MR. DE SARNO: The judgment.

THE COURT: Against the Township of Edison?

MR. DE SARNO: Yes.

THE COURT: I am talking about the rest of the judgment.

MR. DE SARNO: It is not against the Township of Edison.

*Appendix C*

THE COURT: It is against police officers acting under color of state law. That was a fact. Nobody has reminded me of this, but I have a memory for some details, that was stipulated at trial. The jury didn't have to find it. Mr. Boglioli stood up and said we take issue with that.

MR. DE SARNO: Well, he disagrees with that, Judge.

THE COURT: He may disagree with it now, but that is the position he took at trial, and that is what I would find, even if he disagreed. With reference, at least, to the compensatory damages, and the punitives are not before me this morning, because Mr. Abramowitz is seeking only the compensatory damages, and the costs, and the attorneys' fees, and Mr. Soos, for Mr. Hendricks, is seeking attorneys' fees for those attorneys retained by the Township of Edison to [6] represent these officers acting under color of state law.

MR. DE SARNO: But they have been paid those fees, Judge.

THE COURT: They have?

MR. SOOS: Yes, your Honor. We haven't been paid, but pursuant to a court order entered in the Superior Court, Edison Township has been commanded to pay.

THE COURT: That is news, because as of last week they had not be paid.

MR. SOOS: Just to clarify, your Honor, we are here on their motion. We filed a similar motion in the the 19th, but when we had found out Mr. Abramowitz filed one here before you, we ask that be adjourned until this one is decided.

THE COURT: All right. That is fine. So you agreed to pay the attorneys fees?

MR. DE SARNO: That was the only thing before the court. All the other fees have been paid prior. I might say to your Honor, in retrospect we didn't have to pay any attorney fees. The Township was generous in paying any fees at all.

THE COURT: I don't know about that. I saw the agreement that was reached where you agreed to pay sixty dollars an hour to these gentlemen to represent your employees, and they sat at trial for a month before me, and [7] you are going to say now you have no obligation to pay them?

MR. DE SARNO: I am saying we did that out of generosity, not that the law required it at the time. That is a state matter, incidentally.

THE COURT: Is that not part of the collective bargaining agreement?

MR. DE SARNO: No, it isn't. There are a

line of cases in New Jersey that govern, and the statute—

THE COURT: I know lines of cases, but I also know what a signed agreement says.

MR. DE SARNO: Well, that is not before this Court.

THE COURT: Well, you paid the attorneys' fees.

MR. DE SARNO: Between the PBA, the contract, and the Township of Edison is not part of this case. I fail to see how there is any are} jurisdiction in this Court.

THE COURT: I have the jurisdiction to enforce one of my judgments, do I not?

MR. DE SARNO: That's correct.

THE COURT: Therefore, I have jurisdiction now to deal with this. I need no argument on that issue.

MR. DE SARNO: You are talking about dealing with the judgment against the Township, I agree with your Honor. There is no contest about that. I don't represent the Township on that behalf, that is Mr. Boglioli' obligation. He represents the carrier.

[8] As I said, they have always been willing and able to pay it. They won't give them a proper order to satisfy judgment. When the attorney for New Jersey understood the facts, he said to me, "I don't understand why they won't give it to you." I said, "Tell your clients to do it."

THE COURT: You keep talking about this attorney from Jersey.

MR. ABROMOWITZ: If I may clarify something. I don't know what conversations Mr. DeSarno had with Mr. Aberstater, who is our local counsel in New Jersey, because of rules that Jersey demands—

THE COURT: I know. You are local counsel.

MR. ABROMOWITZ: Yes. The reason we did not accept the offer from the Township on that portion of the interrogatories that were on the pendent claims only, was that the warrant that was being asked of us seemed, in our judgment, to relete the Township from any obligations and we communicated that to Mr. Boglioli on numerous occasions. It was our consensus among the attorneys that if we gave that kind of warrant on that pendent claim, he could later come back to say—they could later come back and say to us, "Judge, we met all our obligations. What are you talking about now?"

THE COURT: Is it not crystal clear, Mr.

Abromowitz, that the Township of Edison, by virtue of the collective [9] bargaining agreement, and I think by virtue of statute, is not obligated to pay, not just the judgment against it on its pendent claim, on the claim that it was found liable for, the pendent claim, but the compensatory judgment, at minimum, against the three officers acting under color of state law?

MR. ABRAMOWITZ: Our position is they are obligated to pay it. The contract is crystal clear. There—

THE COURT: And if they pay that total judgment, you will give them the waiver?

MR. ABRAMOWITZ: Of course.

THE COURT: All right. Mr. McGowan has been trying to speak. Let me hear from him for a moment, Mr. DeSarno.

MR. MC GOWAN: Your Honor, we have worked out, I think, subject to some small points, the judgment against the township, per se.

THE COURT: On the pendent claim?

MR. MC GOWAN: On the pendent claim of $74,000 and change, plus the post judgment interest. That is worked out.

I have submitted a warrant, getting that forth,

a standard form, New Jersey warranted, setting that forth to Mr. Aberstater, and I have spoken with Ms. Mellor and Mr. Abramowitz here today, and I think that is going to go through. The check has been ordered. I think that is no longer a problem. It is my fervent hope that that is no longer a problem. But in exchange for that, assuming that [10] that does go through and assuming they approve the form of the warrant, that entitles the Township of Edison, on the judgment for which this office represented them to a full and complete satisfaction and warrant. Because, you see, if—

THE COURT: Who is going to pay the judgment, Mr. McGowan? Who is going to pay the judgment on the constitutional claims and pendent claim.

[11] MR. MC GOWAN: Against the individual officers?

THE COURT: Yes, we are not talking now about Gus Leontarakis and the Captain's Wheel.

MR. MC GOWAN: Strictly as to Marcos.

THE COURT: Yes. Your employees. Who is going to pay that judgment?

MR. MC GOWAN: I have to speak very carefully here, because I am here in a very odd position, as I see it. I am here strictly with that

judgment, per se, against the Township. My suspicion is—

THE COURT: I have had Mr. DeSarno here on the rest. Please tell me who is here on the rest?

MR. DE SARNO: I am here on an order to show cause that seems to suggest that because there was a collective bargaining agreement, the language we all know about—

THE COURT: Who is representing the Township for purposes of the judgment against other than the township itself? Mr. Desarno, are you?

MR. DE SARNO: In that connection, Judge, I don't think there is anything before this Court to argue on that, as respects—it is clear the judgment is against the three officers, not the Township.

THE COURT: I am talking about the three officers, employees of the Township.

[12] MR. DE SARNO: I think it is crystal clear also that there is a state case pending on the very same issue where it properly belongs, it doesn't belong in this forum.

THE COURT: No, I take it here, and if you say I am wrong, take me up, Mr. DeSarno, there was a judgment entered in this Court which I

believe has been violated, violated in the sense that the judgment has not yet been paid. The verdict came in a year ago, and I know there were some machinations post trial, but the verdict came in a year ago. It was a stipulated fact that these officers were acting under color of state law. Stipulated by the attorney for the Township of Edison.

Sit, Mr. McGowan.

There was never any doubt in anyone's mind in this courtroom, or in that courtroom, that the Township was going to pick up the freight, and in fact I was advised so in a number of conversations.

MR. DE SARNO: I never advised the Court of anything in that respect.

THE COURT: I didn't say you did. But everybody understood what was happening and indeed that was one of the reasons that settlement wasn't reached.

MR. DE SARNO: The constitution of the State of New Jersey doesn't permit it. I have statutory authority that says you can't pay that judgment, you just can't.

THE COURT: What about your collective bargaining agreement? What did you do with that.

*Appendix C*

MR. DE SARNO: It has to be read in connection with the statute, Judge.

THE COURT: Oh, you mean you make agreement with your employees, and then you later take it and shove it at them.

MR. DE SARNO: Judge, it is strictly a state matter. The *Moya* case settles the issues. The *Moya* case talks about when even officers are entitled to be represented it talks inferentially about the obligations that maybe the obligation of the municipality. This is willful, wanton action. If there is coverage, I have suggested to the counsel for the officers, as a matter of fact, who is taking the burden for these plaintiffs, that he ought to join the carrier. There might be some coverage, but to say that the Township itself directly is liable, I think is incorrect, and it is against all the law of New Jersey.

THE COURT: What? your collective bargaining agreement?

MR. DE SARNO: What about it, Judge?

THE COURT: Would you please explain to me the effect of a collective bargaining agreement on this?

MR. DE SARNO: The collective bargaining agreement merely recites the statute, it talks about obligations, [14] you have to read it in the context

of the whole position, 40(a). It really recites the statute about whether they are entitled to be represented. Then it goes on to say that the first part of that section they pulled out wasn't put into the brief, I have it in brief which I don't have but when you read it all in context, what it suggests, and I suggest this to your Honor, collective bargaining agreement is not dispositive of ultimately the issue in this case. It depends what the Constitution permits us to do and what other statutory authority permits us to do. It does not permit us to pay this kind of judgment.

THE COURT: "In the event of a judgment against a member of the bargaining unit arising out of or incidential to the performance of his duty, the employer agrees to pay for said judgment or arrange for the payment of said judgment." What could be clearer than that.

MR. DE SARNO: Assuming that it could be done within the framework of the Constitution of New Jersey, and when the statutory authority of a municipality. You have to assume that, Judge, and you can't do it.

THE COURT: You mean you entered into agreement with your employees violative of both the Constitution and the statute?

MR. DE SARNO: That is not unusual, Judge, in [15] collective bargaining agreements.

*Appendix C*

THE COURT: Oh, Mr. DeSarno.

MR. DE SARNO: There are not a managerial things that contracts are not enforceable. You are reading it too strictly. You are not understanding the framework of the state law that surrounds itself.

THE COURT: I have gotten no papers to help me from you, Mr. DeSarno.

MR. DE SARNO: I have no authority that says I should be here also. On—

THE COURT: When you have an order of this Court ordering you here?

MR. DE SARNO: I am here.

THE COURT: I know.

MR. DE SARNO: But counsel cites no authority for me, no case, no Code reference, no rule of this court that says that I should be here arguing an issue that I deem not to be within the jurisdiction of this Court, that should be in the state court where it properly is. You are talking about an issue that involves a PBA contract, vis-a-vis three officers, strictly speaking, that is just a state matter.

THE COURT: I am seeking here, and jurisdiction to do so, to enforce my judgment. A

state court should not be required to enforce my judgment.

[16] MR. DE SARNO: But your Honor, the judgment you are enforcing is not against the Township of Edison. That is the problem. There was never a judgment entered against the township except in one respect. Now you—

THE COURT: I can enforce it against the Township of Edison.

MR. DE SARNO: You are litigating an issue that was never raised in the trial before, you Honor. It is a separate, distinct issue.

THE COURT: It was never an issue in the trial.

MR. DE SARNO: It was never an issue, that's right.

THE COURT: Why should it have been an issue in the trial? Who is going to pay an obligation that nobody doubted the Township of Edison was going to pay, or its carrier?

MR. DE SARNO: You say that, your Honor, when I tell you the Constitution of the State of New Jersey doesn't permit it, in 59:210 doesn't permit it and—

THE COURT: Are you suggesting that the

agreement that you pay for the defendant, that you pay for the defense is also null and void and you did that out of largess, also?

MR. DE SARNO: I am not making myself clear.

THE COURT: You are not.

MR. DE SARNO: I am trying to say to you in a direct way what can be paid legally has to be read into the context of this agreement. You can't do something you can't do. Okay?

[17] THE COURT: All right.

MR. DE SARNO: And that is what is in the state court and that is where it properly belongs. There is nothing in this case that ever said the Township should pay for these officers except themselves, because it is willful, wanton, outrageous actions, if you please, and our cases say that, our Chief Justice has said that in the *Moya* cse.

THE COURT: Willful, wanton, outrageous. That may be true as to the punitive damage aspect, because that is in fact a definition of punitive damages. There is no requirement for a violation of 1983 and compensatory damages that it be willful, wanton, malicious. That is a punitive standard. It is, rather, that there was an intent to violate the constitutional rights.

You may well be right, and in fact, I would be inclined at this juncture to agree with you, that you don't have to pay punitive damages. I am not ruling at this moment on punitives because it is not before me, but the purpose of punitive damages, as I understand them, is to punish the individual and punishment is not effected when somebody else picks up the tab. That is my instinct on that matter, which is, as I said, not before me. But we are not dealing here with willful, wanton, malicious conduct. We are dealing here with compensatory damages where no such finding is required. [18] So that even if the case you cite stands for the proposition you cited, that is not this case.

Now, Mr. Soos.

MR. SOOS: I would just like to add, your Honor, that the *Moya* case deals with a criminal matter. The officer was charged with a crime, specifically a crime, and it was not a civil matter. The other thing is that Title 59 that counsel cites is the Tort Claims Act of the State of New Jersey, and we are not talking about tort liability here any more. We are talking about a contractual responsibility to pay something.

MR. DE SARNO: If we are talking about a contractual responsibility to pay something, that is not before this Court.

THE COURT: Yes, it is. I have made it before

me. Mr. Abromowitz, what would you like to add?

MR. ABROMOWITZ: I would like to add, if Mr. DeSarno is challenging this Court's jurisdiction, I think that issue has been determined.

THE COURT: I have determined it.

MR. ABROMOWITZ: Yes. If he is challenging the clear and obivous clause in the contract, I think the words defeat him. The contract is beyond dispute.

THE COURT: I think his argument, and I could be wrong, but I think his argument is, you know, the contract is fine, which the laws of the State of New Jersey say that they [19] are not required to compensate for. I think that is his argument.

MR. ABROMOWITZ: I think that is the argument he is trying to make, but I don't think that is an argument justified by the laws of the State of New Jersey vis-a-vis 1983 claims, and I don't think there is anything in the contract that explicitly excludes that kind of case. There is nothing in that contract.

[20] THE COURT: Frankly, I would think this is precisely the kind of case that is within the contemplation of the contract. I can't imagine too many other types of cases, other than something that at least is not formerly filed as a civil rights

action could be, because those are the kinds of cases that we see against police officers in the federal courts and in the state courts, most prominently.

MR. ABROMOWITZ: Furthermore, Judge, if I may add, everything the Township of Edison has done in this case was to argue these men were on duty, they performed on duty, and their sole defense was that there were no violations. That was the whole thrust of the trial. I didn't see anything else in the trial. I sat through it here. Your Honor in her charge, in your charge, rather, made that crystal clear. There is a party of your charge that states specifically that the issue of whether they were or were not acting in performance of their duty wasn't even contested.

THE COURT: It wasn't contested. Mr. Boglioli agreed. Everybody agreed.

MS. MELLOR: Your Honor, I would like to point out in one of the cases cited by us in our brief, which is *Gary W. vs. the State of Louisiana*. There was a similar argument. The state says they don't have to pay the judgment because our state law says we don't have to. I think the circuit court made clear when the state is in federal court it [21] complies with the rules of the federal court and it can be ordered to make such a payment, so I think that takes care of Mr. DeSarno's order.

THE COURT: Is there anything you would

like to say, Mr. McGowan? You were jumping up.

MR. MC GOWAN: Yes, very briefly. I believe that my office's recollection and your recollection differs. I would like to put our position on the record.

THE COURT: My recollection differs from what?

MR. MC GOWAN: Your Honor—

THE COURT: What recollection differs?

MR. MC GOWAN: In my recollection, Mr. Boglioli's recollection, having spoken with him prior to coming here, the reason why the issue of whether or not Quigley, Fekete and Semenza were or were not acting within the scope of their authority at the time was because the three attorneys representing Quigley, Fekete and Semenza stipulated to the fact that they were in the course of their duties and operating under state law. Your recollection seems to indicate to you that Mr. Boglioli went along with that. Most respectfully, we couldn't disagree with you more.

THE COURT: All I can tell you, Mr. McGowan, is my charge went in without objection—

MR. MC GOWAN: Well—

THE COURT: —as all my charges do.

[22] MR. ABROMOWITZ: I have a piece of the charge that I think is directly on point here.

THE COURT: Read it into the record, Mr. Abromowitz. I didn't think this would be argued at all. This seems clear.

MR. ABROMOWITZ: I think this matter was decided by the jury along time ago. "I charge you that the defendant police officers do not contest the facts that whatever actions they took with respect to plaintiffs Marcos Skevofilax and Michael Michaels, they did so in their capacity as officers of the police force of the Township of Edison. Therefore, the element of plaintiffs' claim which requires that defendants have acted under color of state law must be taken by you as proven."

THE COURT: Yes, there was no objection to that statement.

MR. MC GOWAN: But your Honor, that is a self-serving stipulation on the part of the three defendants themselves.

THE COURT: All right. even if my recollection is wrong, and even if Mr. Boglioli, who represented the Township of Edison, did not agree, but I remember his agreeing, I could be wrong, I find now as a matter of law that they were operating under color of state law. Maybe—

MR. MC GOWAN: Then, your Honor, then I think [23] there is another problem that is going to come up as a consequence of that, and that is, I assume that the consequence of that ruling is that your Honor is going to order the Township to pay a certain sum on behalf of these gentlemen. That gets us back to our warrant, again, and I don't know, frankly, right now, off the top of my head, frankly, again, not having anticipated this happening—

THE COURT: You couldn't have anticipated anything else, having gotten the order to show cause.

MR. MC GOWAN: That was the only thing that perhaps led me to believe that this was going to happen. I don't know where that leaves us as far as the warrant, and as far as my paying the judgment that was directly against the town as an entity. That is going to change these, I am sure, because I know, Mr. DeSarno, in his capacity as counsel for the Township is, I am sure, going to make a demand on selected risks, and then we are back into a whole big ball of wax.

MR. ABROMOWITZ: Judge, whatever our position is, whatever exists between the Township and selected risk—

THE COURT: I agree, it is not my business.

MR. ABROMOWITZ: It is not my business.

I wish them the best of luck on that issue.

[24] THE COURT: Yes.

MR. ABROMOWITZ: If what Mr. McGowan is saying that the check for the township's pendent claim is being affected by what is happening in this court today, then I suggest to your Honor that in our proposed order we have a specific category for that specific issue, and your Honor can decide that here and now.

MR. MC GOWAN: You see, your Honor, in order for me, representing the Township of Edison, on the direct verdict against it, on the issues framed in this trial, to pay over the sum of money that is required under the judgment and the remitture, I have not received back from the plaintiffs a total and unqualified standard form warrant to satisfy the judgment against the Township of Edison.

THE COURT: I am certain they will give you that warrant when the whole judgment is paid, when I order that the Township of Edison, by virtue of the collective bargaining agreement and state law, is required to pay the judgment, you will get your warrant, when the judgment is paid. Is that correct, Mr. Abromowitz?

MR. ABROMOWITZ: If they satisfy the judgment, of course we will give them the warrant.

*Appendix C*

MR. DE SARNO: Your Honor, they have already levied on the back account of Edison Township. I was going to move [25] to dissolve that because that judgment is clearly payable by the carrier. There is no reason why it can't be paid.

THE COURT: I am not getting into which carrier pays what part of what judgment. That is for you, Mr. DeSarno, not for me. I am telling you I want my judgment paid, this came in a year ago. You forget, too, I think there was a fairly substantial remitture in this case, and you still are obstreperous for what I perceive some of the weakest reasons I have heard in my year and a half on the bench.

MR. DE SARNO: Well, Judge, we don't always agree, obviously.

THE COURT: No.

MR. DE SARNO: But that is the small part of it. The fact of the matter is you have made a ruling today that is substantial, it comes as a clear surprise to Edison Township.

THE COURT: It shouldn't come as a surprise. You received the order to show cause. As always, I received no papers from you, Mr. DeSarno, and I am not sympathetic to a last minute cry for "we are surprised." Apparently, you and the plaintiffs' attorneys have been going through this now for months.

MR. DE SARNO: I haven't talked to the plaintiffs' attorneys, Judge.

THE COURT: In fact you only now paid your own [26] defense lawyers under threat of court order, or because of court order.

MR. DE SARNO: I have never talked to the plaintiffs—

THE COURT: Somebody has been talking to somebody.

MR. DE SARNO: Not I, and not the Township of Edison, make that clear for the record.

THE COURT: I will make it clear for the record.

MS. MELLOR: Make clear for the record I have, in fact, spoken to Mr. DeSarno on more than one occasion.

MR. DE SARNO: I talked to Carol Mellor to ask her why she levied on the Township of Edison when the carrier is willing to pay the judgment.

MR. ABRAMOWITZ: Because of other legal issues involved, we have let out Louisa Skevofilax's claim for this motion and we are preparing another motion in regards to that.

*Appendix C*

THE COURT: I think it is fairly clear today why I will rule as I do, and I will not go through the reasons, but let it be said that I, under state law, most particularly under the collective bargaining agreement, I have the jurisdiction to enforce the judgment that was entered in this court.

I am not pleased with the conduct that I have seen and the obstreperous nature, and I am going to sign Mr. Abromowitz's order.

[27] Now, I haven't yet, but I will sign it, and, I have read it, but not in fine detail. I will include costs for today, for the time, the attorneys' fees for the time and expense that it took to get to this court today, and I am going to order that the judgment be satisfied, the judgment against the individual police officers will be satisfied by the Township of Edison, who by contract and by state law is obligated to do so, as they were acting under color of state law.

MR. ABROMOWITZ: Thank you, your Honor.

MR. DE SARNO: May I ask, your Honor, that you stay that order pending an appeal? I have to get back to my, to the Township, the Mayor and Council, and advise them of it.

THE COURT: I am not staying the order pending the appeal.

*Appendix C*

MR. ABROMOWITZ: Thank you, your Honor.

(Pause.)

THE COURT: I will sign the order now, if you want to wait for it, Mr. Abromowitz.

MR. ABROMOWITZ: Thank you, your Honor.

## APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY DATED APRIL 25, 1985

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

79 Civ. 2783

MARCOS SKEVOFILAX, et al.,

Plaintiffs,

-against-

SGT. WILLIAM QUIGLEY, et al.,

Defendants.

ORDER

Plaintiffs having moved this Court pursuant to Rules 69 and 70 of the Federal Rules of Civil Procedure for an Order and Writ of Execution, and the matter having duly come on to be heard before me, and after due consideration thereof, it is hereby

ORDERED that the Township of Edison:

a) To pay and satisfy the portion of said Judgment entered against the individual police officers in favor of plaintiff Marcos Skevofilax for compensatory damages, as reduced by the remittitur in the sum of $296,700.19;

b) To pay and satisfy the portion of said judgment entered against the individual police officers in favor of Marcos Skevofilax

in the amount of $55,236.75, being the judgment for compensatory damages as reduced by the remittitur entered by reason of malicious prosecution;

c) To pay and satisfy the portion of the said judgment entered against the Township of Edison in favor of Marcos Skevofilax in the amount of $74,964.14, for compensatory damages for the negligence of said Township.

d) To pay and satisfy the portion of said judgment entered against the individual police officers in favor of Michael Michaels in the amount of $11,000.00 for compensatory damages for constitutional violations;

e) To pay and satisfy the portion of said judgment entered against the individual police officers in favor of Michael Michaels in the amount of $1,000.00 being the judgment for compensatory damages for malicious prosecution.

f) To pay the plaintiffs the sum of $3,048.70 which is the amount entered by the Clerk of the Court for costs in this action;

g) To pay all above stated sums with interest at the rate of 11.74% from May 31, 1984, being the date of entry of judgment, to the present.

h) To pay to the plaintiffs the sum of $199,521.00, being the amount of attorneys fees awarded by this Court;

i) To pay to the plaintiffs the sum of $5,706.45, being the amount of disbursements previously awarded by this Court.

j) To pay the sums listed in h and i hereof, with interest at

the rate of 11.74% from November 28, 1984.

k) To pay to plaintiff's additional attorneys fees and disbursements in the amount of $3,763.00.

Payment to be made in full within 15 days of the date of this order.

The motion of the Township for a stay is denied.

s/ Maryanne Trump Barry
MARYANNE TRUMP BARRY

April 25, 1985